Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,
Petitioner,

v.

JOSEPH GREFER ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, a Louisiana jury held ExxonMobil liable for property damage caused when a local company cleaned ExxonMobil's pipes on a tract of industrial property, leaving trace amounts of naturally occurring radioactive material on the property. Plaintiffs urged the jury to award punitive damages based primarily on the risks this material posed to the cleaning company's employees and the public, and the jury awarded $1 billion in punitive damages. That punitive damages award was over 17 times the jury's award of remediation costs and over 600 times the value of the property. On appeal, the Louisiana Court of Appeal, Fourth District, reduced the punitive damages award to $112 million and affirmed. It recognized that the trial court had improperly allowed the jury to award punitive damages based on harms to the public, but it determined that the trial court's error did not warrant a new trial. The questions presented are as follows:

1. Whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.

2. Whether due process requires that an appellate court order a new trial, rather than reduce a punitive damages award, when the award rests on improper considerations and the tainted portion of the award cannot be quantified or excised.

3. Whether due process permits an award of punitive damages of twice the amount of compensatory damages in a case of solely economic injury when compensatory damages are $56 million and plaintiffs' actual harm is no greater than $1.5 million.

PARTIES TO THE PROCEEDING

Petitioner is Exxon Mobil Corporation, one of two defendants-appellants below. Intracoastal Tubular Services, Inc. was the other defendant-appellant below and is a respondent under this Court's Rule 12.6. Other parties named as defendants in the trial court – none of whom were parties on appeal – were Alpha Technical Services, Inc.; Chevron, U.S.A., Inc.; Conoco, Inc.; Homeco Inc.; HuntPetroleum Corp.; Hassie Hunt Exploration Co.; Mobil Exploration & Producing Southeast, Inc.; Phillips Oil Co.; Sexton Oil & Mineral Corp.; Shell Offshore, Inc.; Shell Oil Co.; Shell Western E&P, Inc.; System Fuels, Inc.; Texaco, Inc.; Tubular Corp; OFS, Inc.; and Oilfield Testers, Inc.

Plaintiffs-appellees below, Joseph Grefer, Camille Grefer, Rose Marie Grefer Hassi, and Henry Grefer, are respondents under this Court's Rule 12.6.

RULE 29.6 DISCLOSURE

Exxon Mobil Corporation has no parent corporation and no person or entity owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Exxon Mobil Corporation ("ExxonMobil") respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Court of Appeal, Fourth Circuit, in this case.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal is reported at 901 So. 2d 1117 and is reprinted in the Appendix to the Petition ("App.") at 1a-61a. The final judgment of the trial court is unreported and is reprinted at App. 62a-66a.

JURISDICTION

The Court of Appeal issued its opinion on March 31, 2005, and denied ExxonMobil's timely petition for rehearing on May 16, 2005. App. 1a, 67a-72a. The Louisiana Supreme Court denied ExxonMobil's timely petition for certiorari review on March 31, 2006. *Id.* at 73a-74a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

In this case, a Louisiana jury awarded $1 billion in punitive damages against ExxonMobil, *not* based on the harm it caused to *plaintiffs* – which all concede was limited to property damage – but rather based on potential health risks to *non-parties*. Plaintiffs sued ExxonMobil to recover the costs of remediating their industrial property. Trace amounts of naturally occurring radioactive material ("NORM") had been deposited when Intracoastal Tubular Services, Inc. ("ITCO") cleaned and stored pipes used by ExxonMobil and other oil companies on the property. Although plaintiffs alleged only

property damage, they urged the jury to award punitive damages based not on that damage, but on the health risks posed by NORM to others. Starting in their opening statements and continuing throughout the trial, plaintiffs urged the jury to punish ExxonMobil for putting ITCO employees and the public at risk, and the trial court instructed the jury to calculate the amount of punitive damages based on harms to those non-parties. As a result of that flawed trial, the jury awarded a staggering $1 billion in punitive damages.

The Louisiana Court of Appeal did not correct the trial court's serious errors. It recognized that the jury should not have been allowed to base its punitive damages award on potential harms to the public. But it approved the jury's use of potential harms to ITCO employees, finding ExxonMobil's conduct reprehensible because ExxonMobil failed to give timely notice of the risks of NORM to ITCO – even though the delay in giving notice did not injure plaintiffs. And the appellate court failed to remedy the error it did identify. Rather than ordering a new, fairly conducted trial, the appellate court reduced the punitive damages award to twice the compensatory award, which it believed was the constitutional maximum award.

A. Factual Background

1. Plaintiffs jointly own a 33-acre tract of industrial property in Harvey, Louisiana. *See* App. 10a & n.8. That tract of land would be worth at most $1.5 million if it had never been damaged or was fully remediated. *Id.* at 34a, 37a, 53a.

Plaintiffs for decades leased their land to ITCO, an oil and gas service company. App. 10a. ITCO's services included the storage, handling, transportation, inspection, cleaning, and threading of drill pipes used in oil production. *Id.* Several oil companies, including ExxonMobil, routinely sent their pipes to ITCO for cleaning. *Id.* As part of cleaning the pipes, ITCO removed "scale" that had built up inside

some of the pipes over time. *Id.* at 11a-12a. Scale is caused by mineral salts precipitating out of solution as oil and gas flows through the pipes from underground reservoirs to the surface. *Id.* at 5a. Some of the scale contained radium sulfate, and over several decades, the pipe cleaning activities led to the accumulation of NORM on plaintiffs' property.

2. Although ExxonMobil and other oil companies had sent pipes to ITCO for cleaning since the early 1950s, it was not until 1986 that ExxonMobil learned that some of the scale in the pipes contained low levels of NORM. App. 7a-8a. Within nine months of that discovery, ExxonMobil notified ITCO and stopped shipping pipes to it for cleaning. *Id.* at 8a. ITCO continued to store pipes on the property until 1992, when it ceased all operations on plaintiffs' land. *Id.* at 9a-11a.

B. Proceedings Below

1. In August 1997, plaintiffs sued ExxonMobil, ITCO, other oil companies, and other pipe-cleaning companies, claiming that their property had been damaged as a result of the cleaning and storage of pipes on the property. App. 11a-12a. Plaintiffs asserted claims for negligence, strict liability, absolute liability, nuisance, fraud, and breach of contract. *Id.* at 12a. Plaintiffs sought damages for loss of use and remediation of the property and punitive damages. *Id.* They did not assert any personal injury claims. Only the claims against ExxonMobil and ITCO went to trial.

2. During a five-week trial in April and May of 2001, the plaintiffs urged the jury to award massive punitive damages against ExxonMobil, based not on *plaintiffs'* injury, but on alleged risks posed to *ITCO employees* and the *public* by NORM on plaintiffs' property. In his opening statement, plaintiffs' counsel described NORM as "a very, very, very

fine powder" that will "blow all over the place." R.32:17.[1] During trial, witnesses expressed concern that radioactive material would "bl[o]w over a neighborhood," R.32:122, 131, "travel towards the houses," R.33:19, and infiltrate churches and schools, R.33:200; R.34:38; *see also* R.39:137-38; R.39:228-29; R.39:230-31 (testimony of the plaintiffs that they believed NORM was harmful to the community). Plaintiffs showed the jury a video of schoolchildren getting on and off a bus near their property, implying that the children had been exposed to harmful levels of radiation. R.33:191-99. Plaintiffs also suggested that radium from plaintiffs' property would enter the "food chain," R.29:131, that it would cause cancer and birth defects, R.29:137-41, and that ExxonMobil had failed to monitor ITCO employees or community members for radiation exposure, R.32:131-36. Plaintiffs compared the conduct in this case to the Exxon Valdez oil spill and urged the jury to bring ExxonMobil "to an altar" again. R.56:43. In closing arguments, plaintiffs argued that ExxonMobil left ITCO employees and the public "unprotected for months, years, without telling them" about risks posed by NORM. R.56:42.

All of this evidence, plaintiffs explained to the trial court, was intended to show that NORM "threatened" ITCO employees and the public health and was an "environmental hazard" in order to provide the jury with a basis to award massive punitive damages against ExxonMobil. R.33:193; *see also* R.29:108-09 (stating that the evidence went to "the quantum of punitive damages"). ExxonMobil repeatedly objected to this inflammatory and irrelevant evidence, but the trial court overruled those objections. *See, e.g.*, R.29:114, 138-41; R.33:200; R.34:38.

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[1] Citations to the trial court transcript are to the record filed with the Court of Appeal and take the form "R.[volume]:[page]."

3. Not only did the trial court permit plaintiffs to introduce evidence that could not properly be considered, it instructed the jury to award punitive damages based on potential harms to the public. The trial court told the jury that it could award punitive damages if it found that ExxonMobil's conduct was "wanton" or "reckless," which it defined as "know[ing] that public safety was at risk" or that it was "highly probable that harm to the public would result from [ExxonMobil's] conduct." App. 75a; *see also id.* (punitive damages appropriate if ExxonMobil exhibited "conscious indifference to consequences amounting almost to a willingness that harm to the public safety would follow"). In instructing the jury regarding whether plaintiffs had established the necessary predicate for punitive damages, the trial court did not mention harm to the plaintiffs.

The trial court then instructed the jury regarding how to determine the proper amount of punitive damages. It stated that "[e]xemplary damages are regarded as a fine or penalty for the protection of the *public interest*," awarded "to compel the wrongdoer to have due and proper regard for the rights of the *public*," and the jury should choose "an amount of exemplary damages which . . . will be reasonably likely to accomplish that purpose." App. 75a (emphasis added). The court then told the jury that other "factor[s]" it could "consider" were "the nature and the extent of the harm to the plaintiffs" and the "defendant's financial position." *Id.* at 75a-76a. Thus, the jury was explicitly instructed first and foremost to consider harm to the public; harm to the plaintiffs themselves was but a secondary factor at best.

4. The jury responded by awarding $1 billion in punitive damages against ExxonMobil.[2] App. 13a. That enor-

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[2] That massive punitive damages award was returned despite the fact that Article 2315.3 of the Louisiana Civil Code, the state law authorizing punitive damages, did not exist until September 1984, almost 30 years after ITCO started cleaning pipes for ExxonMobil, and was repealed in

mous award was in addition to the jury's award of $56 million in remediation costs, which plaintiffs may – but are not required to – expend on their property. *Id.* The jury also awarded plaintiffs $145,000 in general damages. *Id.* The trial court entered judgment against ExxonMobil for a total of $1.056 billion, plus interest and costs.

5. ExxonMobil appealed to the Louisiana Court of Appeal, Fourth Circuit. On March 31, 2005, the Court of Appeal affirmed the trial court's judgment, as amended. It rejected ExxonMobil's various state law arguments that would have reduced the compensatory damages award, leaving the $56 million award intact. *See* App. 15a-48a. It then reduced the punitive damages award to $112,290,000, twice the award of compensatory damages and 75 times the value of the property. *Id.* at 57a.

The court first determined that ExxonMobil's conduct was reprehensible – not based on ExxonMobil's conduct toward the plaintiffs, who "suffered strictly economic harm," but based on ExxonMobil's "nine-month delay in notifying ITCO . . . of the dangers posed from handling NORM contaminated equipment." *Id.* at 50a.[3]

April 1996, one and one-half years before this lawsuit was filed. Because ExxonMobil stopped shipping pipes to ITCO by March 1987, App. 8a, the statute was only in effect for less than three years out of the decades of conduct at issue in this case.

[3] On application for rehearing, the Court of Appeal rejected ExxonMobil's argument that punitive damages could not be based on "put[ting] ITCO's employees at risk," calling that argument "an exceedingly narrow reading of [*State Farm v.*] *Campbell*." App. 68a; *see also* Brief of Appellant Exxon Mobil Corp. at 31, *Grefer v. Alpha Technical*, No. 2002-CA-1237 (La. Ct. App. Dec. 30, 2002) (arguing that "if conduct does not itself form a proper predicate for a punitive damages award, that conduct may not be used as an excuse to inflate a punitive damages award based on different conduct").

The court then compared the punitive damages award to plaintiffs' harm. It properly recognized that the jury's deliberations on the amount of punitive damages had been tainted by reference to potential harms to the public:

> Although the plaintiffs claimed only property damage, and no physical harm, the trial court allowed the plaintiffs to argue and present substantial evidence, over Exxon's objections, of the potential and/or alleged actual harm to other persons who were not parties to this suit and whose claims were not before the jury.

App. 53a. That evidence "was irrelevant and, more than likely, confused the jury, contributing to its exorbitant punitive damage award," an award that "is neither reasonable nor proportionate to the amount of harm to the plaintiffs and to the general damages recovered." *Id.* at 54a. But the appellate court did not order a new trial; rather, it simply "reduce[d]" the jury's award to "twice the general damage award," which it determined was the "highest figure" that could be awarded consistent with due process. *Id.* at 57a, 69a.

REASONS FOR GRANTING THE PETITION

Here, a Louisiana jury awarded $1 billion in punitive damages, based not on the plaintiffs' economic injury or on ExxonMobil's conduct towards them, but rather on the risk of harms to third parties. This petition raises three important issues that warrant this Court's consideration:

First, this case raises the question whether due process permits a jury to punish a defendant based on its conduct toward non-parties. Although *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003), reaffirmed that a defendant may only be punished for "the specific harm suffered by the plaintiff," the lower courts are divided regarding the purposes for which a jury may consider conduct toward non-parties in awarding punitive damages.

This Court has recently deemed the issue worthy of review, having granted certiorari in *Philip Morris USA v. Williams* (No. 05-1256) (cert. granted May 30, 2006). The first issue presented here is the same as in *Williams*, but this case raises an additional important and intertwined issue – the question of remedy – as discussed below. This Court should grant review and consolidate this case with *Williams* so that it can consider both the limits on the use of non-party harms and the proper remedy if the trial court exceeds those limits. At the very least, this Court should hold this petition pending the decision in *Williams*.

Second, this case presents another important question that has divided the lower courts: whether due process permits a reviewing court to remedy a jury's improper consideration of harms to non-parties with a reduction of the punitive damages award, rather than a new trial. In this case, the appellate court determined that the trial court erred in allowing the jury to award $1 billion in punitive damages based on the potential for harm to non-parties. Yet it did not order a new trial; rather, it reduced the punitive damages award to $112 million, which it deemed the maximum award consistent with due process. There is a split in authority in the lower courts regarding whether such a reduction is constitutionally permissible when the award is tainted by unconstitutional considerations and the reviewing court cannot quantify the tainted portion of the verdict. The Ninth Circuit and the Supreme Court of Kentucky have held that due process generally requires a new trial, while the California Court of Appeal, the Indiana Court of Appeals, and the Eighth Circuit have held that reduction of the award can cure the constitutional defect. This Court granted review of this issue in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), but it did not ultimately decide the issue. The need to address this question will only be heightened by *Williams*.

Third, this case raises the issue of the maximum punitive damages award allowed in a case involving exclusively economic harm where compensatory damages are undeniably "substantial." Although *State Farm* teaches that, in cases of "substantial" compensatory damages, punitive damages in an amount "equal to compensatory damages" may be the maximum permissible under the Constitution, 538 U.S. at 425, and the appellate court found that the punitive damages award was "substantial" here, it reduced the award to *twice* the amount of compensatory damages. This case provides a striking example of the confusion in the lower courts about when a 1:1 ratio of punitive to compensatory damages is required. Some courts have strictly adhered to this Court's statement in *State Farm*, capping punitive damages at the amount of compensatory damages, while others have virtually ignored *State Farm*'s teaching on this issue, approving much higher ratios. This Court should grant the petition to provide additional guidance on this issue.

I. THE LOUISIANA COURT OF APPEAL'S IMPOSITION OF PUNITIVE DAMAGES FOR THIRD-PARTY HARMS CONTRAVENES THIS COURT'S PRECEDENTS AND EXACERBATES A CONFLICT AMONG THE LOWER COURTS

The decision below presents a critical issue that this Court has already deemed worthy of review: whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties. *See Philip Morris USA v. Williams*, No. 05-1256 (cert. granted May 30, 2006) (question two).

In this case, the jury returned a punitive damages award of $1 billion, based on *everything but* harm to the plaintiffs. "From their opening statements onward" and continuing "throughout the litigation," *State Farm*, 538 U.S. at 420-21, plaintiffs urged the jury to award punitive damages based on the risks posed to ITCO employees and the community at

large by NORM on plaintiffs' property. "Although the plaintiffs claimed only property damage, and no physical harm," plaintiffs made ominous references "designed to foment the fear of a radium dust cloud blowing over houses, churches, and schools" in the community; showed a video "depict[ing] elementary school children getting on and off a bus"; asked a nurse about "the effects of x-ray radiation and the protections taken by those working with x-ray machines to avoid personal injury"; and questioned witnesses about "the potential harm of radiation to children and unborn children." App. 53a-54a.

The trial court then instructed the jury to award punitive damages against ExxonMobil based on potential harm to the public. It told the jury that the proper amount of punitive damages depended, first and foremost, on the need "to compel [ExxonMobil] to have due and proper regard for the rights of the public." App. 75a. Harm to the plaintiffs was only "[a]nother factor" that the jury could "consider." *Id.* Those instructions turned *State Farm* on its head. Rather than limiting the jury's consideration to harm to the plaintiffs, they focused the jury's attention on risks to the *public* and told the jury that the actual injury to the plaintiffs was only one secondary factor that the jury could "consider" in its discretion.

The Court of Appeal did not fully remedy the trial court's error. Although it correctly recognized that the jury should not have been permitted to calculate punitive damages based on harms to the general public, it nonetheless relied on potential harms to ITCO to deem ExxonMobil's conduct reprehensible. As explained in detail below, recklessness toward third parties may be considered in assessing reprehensibility, but only when the defendant has been similarly reckless toward the plaintiffs. In this case, that necessary predicate is lacking.

Because the jury punished ExxonMobil for the effects of its conduct on non-parties, the punitive damages award was orders of magnitude greater than any harm actually suffered by the plaintiffs in this case. And there is now a concrete risk of duplicative punishment, because pipeyard workers and neighboring residents have filed numerous class action lawsuits against ExxonMobil, purporting to represent thousands of people adversely affected by the cleaning of pipes on the Grefers' land and seeking their own compensatory and punitive damages. *See, e.g.*, *In re Harvey TERM Litigation*, No. 01-8708 (La. Dist. Ct. Parish of Orleans, Div. D). For those reasons, the award contravenes this Court's decisions in *State Farm* and *BMW*. In addition, it exacerbates a conflict among the federal courts of appeal and the state courts on which this Court has already granted certiorari.

A. The Decision Below Conflicts With *State Farm* And *BMW*

In *State Farm*, the Court made clear that a distinction must be drawn between accounting for the full effects of a defendant's behavior in order to assess reprehensibility and actually punishing the defendant for harm to non-parties. The *State Farm* Court found it appropriate to consider the possible effects of the defendant's conduct on non-parties or previous similar conduct in assessing reprehensibility because that makes the conduct more blameworthy than a one-time incident that only affects the plaintiff. 538 U.S. at 419-20, 423. But "[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance"; rather, conduct toward non-parties may only be considered in assessing reprehensibility when it "ha[s] a nexus to the specific harm suffered by the plaintiff." *Id.* at 422.

The *State Farm* Court also held that the amount of punitive damages awarded must be based on harms the *plaintiffs* actually suffered: "Due process does not permit courts, in

the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." 538 U.S. at 423. Allowing a jury to award punitive damages based on harm to non-parties "creates the possibility of multiple punitive damages awards for the same conduct" because non-parties could bring their own claims against the defendant and recover punitive damages. *Id.*

This Court similarly recognized in *BMW* that a jury may not, consistent with due process, award punitive damages to punish all of a defendant's supposed misdeeds. It determined that evidence of extraterritorial conduct affecting other customers "may be relevant to the determination of the degree of reprehensibility of the defendant's conduct," but that the jury could not "use the number of sales in other States as a multiplier in computing the amount of its punitive sanction." 517 U.S. at 574 n.21; *see also id.* at 593 (Breyer, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.").

A simple example illustrates the teachings in *State Farm* and *BMW*. If a defendant's reckless conduct harms ten people, and only one person files suit, then the harm caused to the other nine people may be relevant in assessing reprehensibility, but the plaintiff may not ultimately recover an amount of punitive damages based on harms to all ten people. And that rule assumes that the plaintiff is among the ten people harmed by the defendant's recklessness. If he is not, then the defendant's recklessness toward the other people cannot supply the necessary predicate for a punitive damages award to the plaintiff. But that is precisely what the Court of Appeal allowed in this case.

Here, plaintiffs urged the jury to award punitive damages based on harms to ITCO and the public, not based on plaintiffs' property damage, and the trial court instructed the jury

that it could calculate punitive damages based on those third-party harms. That contravened *State Farm*, which instructs trial courts to keep from the jury "evidence that has little bearing as to the amount of punitive damages that should be awarded" and to properly instruct the jury in "its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." 538 U.S. at 418.

On review, the Court of Appeal failed to restrict use of third-party harms to the limited purposes sanctioned in *State Farm* and *BMW*. It found ExxonMobil's conduct reprehensible based solely on ExxonMobil's failure to give timely notice to ITCO of the risks posed by NORM, even though it acknowledged that the nine-month delay had no effect on plaintiffs' injury, which was "strictly economic harm" caused by the deposit of NORM over the preceding thirty years. App. 50a. That was error. The appellate court should have refused to consider possible harm to ITCO in assessing reprehensibility because the delay lacked "a nexus to the specific harm suffered by the plaintiff." *State Farm*, 538 U.S. at 422.

B. The Decision Below Exacerbates A Split Among The Lower Courts Regarding The Purposes For Which Due Process Permits Consideration Of Third-Party Harms

The decision below also exacerbates a split in authority in the lower courts, a split which this Court has determined warrants review.

1. On one side is *Williams v. Philip Morris, Inc.*, 127 P.3d 1165 (Or. 2006), *cert. granted*, 164 L. Ed. 2d 838 (U.S. May 30, 2006) (No. 05-1256), where the Supreme Court of Oregon approved the use of harms to non-parties, both in assessing reprehensibility and calculating punitive damages. In that case, the court affirmed a $79 million punitive damage award to the widow of one smoker who died of lung

cancer, based not on harms to her husband, but on risks to "the safety . . . of countless other Oregonians," and the unproven assumption that Philip Morris's conduct "caused a significant number of deaths each year in Oregon during the pertinent time period." *Id.* at 1170 & n.1, 1176-78 (internal quotation marks omitted).

The Oregon Supreme Court flatly rejected Philip Morris's argument "that [*State Farm v.*] *Campbell* prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties." *Id.* at 1175. Moreover, the court explicitly rejected a distinction between use of non-party harms for purposes of assessing reprehensibility and for calculating punitive damages, stating:

> It is unclear to us how a jury could "consider" harm to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all.

Id. at 1175 n.3.

2. In contrast, a number of courts have determined, consistent with *State Farm*, that conduct toward non-parties may be relevant to the reprehensibility of the defendant's conduct, but it cannot be the basis for calculating the amount of punishment.

In *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191, 1196 (2005), the jury awarded $10 million in punitive damages – not for the fraud perpetuated on plaintiffs, but for Ford's "overall course of conduct" that plaintiffs claimed injured numerous other California residents. *Id.* at 1196. The California Supreme Court recognized that although due process "does not prohibit state courts . . . from considering the defendant's illegal or wrongful conduct toward others" in assessing reprehensibility, it does not permit a jury to actually award punitive damages to the plaintiffs based on profits

Ford made through sales to *all* California customers. *Id.* at 1204, 1209-10. That "aggregate disgorgement theory" impermissibly "creates the possibility of multiple punitive damages awards" and "present[s] a problem of 'successive prosecution' in which a defendant that loses a single case would also lose the benefit of all previous victories against the same claim of misconduct," *id.* at 1209-10 (internal quotation marks omitted).[4]

In *White v. Ford Motor Co.*, 312 F.3d 998, 1020 (9th Cir. 2002), *amended by* 335 F.3d 833 (9th Cir. 2003), the Ninth Circuit similarly recognized that extra-territorial conduct may be relevant to assessing reprehensibility, but it may not be used to calculate punitive damages. After reversing and ordering a new trial because the jury improperly calculated punitive damages based on harms occurring outside Nevada, the court of appeals noted: "Extraterritorial conduct is admissible for its bearing on degree of reprehensibility, but the jury must be limited to punitive damages reasonably required to vindicate Nevada's legitimate interests in punishment and deterrence, if any, and prohibited from imposing punitive damages to protect people or punish harm outside of Nevada." *Id.*

The Eighth Circuit followed a similar rule in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004), where it held that "courts cannot award punitive damages to plaintiffs for wrongful behavior that they did not themselves suffer," even though they may consider the defendant's

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[4] The *Johnson* Court also identified another serious problem with punitive damage awards that punish a defendant for harm suffered by third parties, which is that plaintiffs may "proceed[] without the formalities of a class action" and "can hope to recover without ever proving the specifics of th[e] 'hypothetical claims'" of the third parties. 35 Cal. 4th at 1210 (quoting *State Farm*, 538 U.S. at 423). That concern is likewise present in this case, for the punitive damages award punishes ExxonMobil for alleged harms to the community that have never been established.

"conduct in other cases" in "assessing the defendant's reprehensibility." As the court explained, a jury that "fails to confine its deliberations . . . to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general," "may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award." *Id.*

The split among these courts illustrates the confusion that has plagued the lower courts since this Court's decision in *State Farm*. Moreover, there are several other courts that have recognized that *State Farm* and *BMW* place *some* limits on consideration of harm to non-parties, but have not resolved precisely what those limits might be.[5] Further guidance from this Court is necessary.

C. This Court Should Grant The Petition Or, In The Alternative, Hold The Petition Pending *Philip Morris USA v. Williams*

The first issue raised in this petition the same as a question on which this Court has granted certiorari in *Williams*. But the facts of this case present a twist on the issue raised in *Williams*, because here, the only reckless conduct identified – ExxonMobil's delay in notifying ITCO of risks posed by

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[5] *See, e.g.*, *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949, 959 (9th Cir. 2005) (holding that jury could "factor[] into the reprehensibility analysis" defendants' previous similar conduct but could not place "a great deal of weight" on it); *Simon II Litig. v. Philip Morris USA Inc.*, 407 F.3d 125, 138-39 (2d Cir. 2005) (denying certification of a nationwide class because *State Farm* prohibits "punishment on any basis that does not have a nexus to the specific harm suffered by the plaintiff"); *Gober v. Ralph's Grocery Co.*, 40 Cal. Rptr. 3d 92, 104-08 (Cal. Ct. App. 2006) (refusing to consider the defendant's subsequent conduct under both the reprehensibility guidepost and the comparable penalties guidepost); *Wohlwend v. Edwards*, 796 N.E.2d 781, 787 (Ind. Ct. App. 2003) (excluding evidence of the defendant's similar conduct in the reprehensibility analysis because that conduct did not harm the plaintiff).

NORM – lacked the required nexus to plaintiffs' injuries. As a result, in this case (unlike *Williams*) third-party harms cannot be used either in assessing reprehensibility or in calculating an amount of punitive damages.

Further, the Court should grant this petition because, in addition to raising the question whether due process permits consideration of harms to non-parties, this case raises an important related question, which is the proper remedy when a reviewing court determines that the trial court has overstepped the constitutional limitations on use of harm to non-parties. The *Williams* petition does not raise that issue because the Oregon Supreme Court did not find a due process violation. *See* 127 P.3d at 1175-76. But, as discussed below, the issue is both important and recurring, and it provides a compelling reason for this Court to grant merits review in this case. At the very least, however, this Court should hold this petition pending its decision in *Williams*. Once this Court renders its decision in *Williams*, it should then grant the petition, vacate the Louisiana Court of Appeal's decision, and remand the case in light of the additional guidance provided in *Williams*.

II. THE LOUISIANA COURT OF APPEAL'S DECISION TO REDUCE THE PUNITIVE DAMAGES AWARD RATHER THAN ORDER A NEW TRIAL DEEPENS A CONFLICT AMONG THE LOWER COURTS

The decision below raises a second critical issue: whether a reviewing court may cure a procedural infirmity, such as the jury's consideration of improper evidence, by reducing the jury's punitive damages award to the highest amount it finds consistent with due process.

This issue is both important and recurring. It was accepted for review by the Court, but not ultimately addressed, in *BMW*. BMW asked this Court to address "[w]hether the Alabama Supreme Court, having found that the jury's

$4,000,000 punitive damages verdict unconstitutionally punished petitioner for hundreds of transactions that occurred entirely outside of Alabama, was obligated to provide a meaningful remedy for that constitutional violation." Petition for a Writ of Certiorari at i, *BMW v. N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (No. 94-896), 1994 WL 16011916 (first question presented).[6] The Court granted review on that question, 513 U.S. 1125 (1995), but it did not ultimately reach the issue, deciding instead that the "appropriate remedy" for the constitutional error "is a matter that should be addressed by the state court in the first instance." 517 U.S. at 586. The issue has arisen repeatedly since *BMW*, provoking a conflict among the lower courts. Further, the issue will become even more important if this Court decides in *Williams* – as it should – that due process limits the purposes for which a jury may consider harm to non-parties in awarding punitive damages.

This Court should grant review and hold that due process requires that a defendant be granted a new trial when a jury's punitive damages award was based on impermissible considerations and there is no means by which to isolate the tainted portion of the verdict. Reduction of an award to the maximum amount consistent with due process simply does not cure a jury's consideration of improper evidence, because the reviewing court has no way of knowing what amount of damages the jury would have awarded had it been properly charged. Put another way, reduction of the award confuses a procedural due process error with the problem of substantive excessiveness. Here, the appellate court reduced the punitive

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[6] BMW argued that the Court could provide a "meaningful remedy" for the constitutional violation in one of two ways: It could either order a new trial on punitive damages, or it could order a remittitur that removed all of the extraterritorial punishment, the amount of which was clear from the precise way in which the jury had calculated punitive damages. Brief for Petitioner at 23-26, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (No. 94-896), 1995 WL 126508.

damages award to the "highest figure" consistent with due process, App. 69a, as if the only defect in the jury's award was that it was too high. But the award was tainted because it was based on improper evidence, and that problem should have been remedied through a new punitive damages trial.

A. There Is A Conflict In The Lower Courts Over The Proper Remedy When A Punitive Damages Award Is Tainted By Improper Evidence Or Instructional Error

The decision below exacerbates a conflict in the lower courts between the Ninth Circuit and the Supreme Court of Kentucky, on one hand, and the California Court of Appeal, the Indiana Court of Appeals, and the Eighth Circuit, on the other hand.

1. Several courts have held that, when a jury's award of punitive damages is based on improper evidence or instructions and the tainted portion of the award cannot be quantified, the reviewing court should order a new trial. For example, in *White v. Ford Motor Co.*, the Ninth Circuit held that merely reducing the punitive damages award could not cure the constitutional error of allowing the jury to award punitive damages based on extra-territorial conduct. 312 F.3d at 1016-20. That is because the appellate court could not know what amount of punitive damages the jury would have awarded if limited to permissible conduct:

> Possibly the jury would have chosen as large an award had it been told to vindicate only the rights of Nevadans, but possibly it would have chosen a substantially lower award. For all we know, the jury would have applied a much lower ratio than the thirty to one the [district] court chose, or the sixty-six to one that the jury initially chose.

Id. at 1016.

Similarly, in *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 157 (Ky. 2004), the Kentucky Supreme Court cured the

jury's improper use of extra-territorial conduct in calculating punitive damages by ordering a new trial. The plaintiffs had "encouraged" the jury to "punish Ford for its conduct throughout the country," in direct contravention of *State Farm*, and "the jury instructions contained no limitations on extraterritorial punishment." *Id.* at 157. The court determined that only a new trial on punitive damages could remedy that error, and it provided model jury instructions and a model verdict form to guarantee that the new trial would comport with due process. *Id.* at 166-67.

In addition to these decisions directly addressing the remedy for improper consideration of harm to non-parties, numerous other courts have recognized that, in the punitive damages context like any other, a new trial is the proper cure for errors in the record evidence, improper arguments to the jury, and other prejudicial procedural errors.[7]

2. Decisions from other courts conflict with *White* and *Sand Hill Energy*, as well as the other decisions requiring new trials when procedural errors infect a jury's punitive damages award, by holding that reduction of the punitive damages award cures a jury's consideration of improper evidence. For example, in *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 71-72 (Cal. Ct. App. 2004), *review granted*, 88 P.3d 497 (Cal. 2004), *review dismissed*, 97 P.3d 814 (Cal.

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[7] *See, e.g., Zaffuto v. City of Hammond*, 308 F.3d 485, 491-92 (5th Cir. 2002) (improperly submitted claim); *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1208-12 (10th Cir. 2002) (affirmative defense improperly denied); *Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 102, 122-24 (3d Cir. 1999) (erroneous jury instructions); *Durham v. Vinson*, 602 S.E.2d 760, 767 (S.C. 2004) (improper evidence admitted); *Kocher v. Oxford Life Ins. Co.*, 602 S.E.2d 499, 502, 504 (W. Va. 2004) (erroneous jury instructions); *Martinez v. City of Grants*, 927 P.2d 1045, 1055 (N.M. 1996) (erroneous jury instructions); *McClure v. Walgreen Co.*, 613 N.W.2d 225, 236-37 (Iowa 2000) (improper evidence admitted); *Veco, Inc. v. Rosebrock*, 970 P.2d 906, 924-25 (Alaska 1999) (improperly submitted claim).

2004), although the jury had heard "substantial evidence of wrongful conduct outside California," and the verdict form did not indicate what amount of punitive damages was awarded for that conduct, the court nonetheless decided that "any error in the consideration of this evidence [would be] sufficiently redressed" by reducing the $50 million award to $9 million, the amount it believed a properly instructed jury would choose. *Id.* at 71-72. *See also Romo v. Ford Motor Company*, 6 Cal. Rptr. 3d 793, 805, 812 (Cal. Ct. App. 2003) (when jury instructions did not "restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs," the resulting award would be cured by a reduction to the amount "a properly instructed jury likely would award"), *overruled in part on other grounds by People v. Ault*, 33 Cal. 4th 1250 (2004).

Similarly, in *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 559-62 (Ind. Ct. App. 1999), the Indiana Court of Appeals approved the reduction of a punitive damages award based on extra-territorial conduct. "[I]n closing arguments before the jury," "counsel invited the jury to return an award of punitive damages based on alternatives that would punish Ford for conduct occurring beyond the borders of this State," and "[t]he jury complied," awarding $58 million in punitive damages. *Id.* at 561. The court of appeals found that the error would be cured by "reduc[ing] the $58 million award to $13.8 million, which represented Ford's retooling costs [to make the Bronco II more stable], along with an additional $54.00 representing the cost for additional hardware installed on each vehicle." *Id.* at 559. Yet there was no suggestion that the jury would have awarded $13.8 million if properly "limited to protecting this State's consumers." *Id.* at 561-62. Indeed, the reduced award was based on a calculation that was not even *presented* to the jury. *Id.* at 559.

And in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004), although the Eighth Circuit correctly

found that the jury's award was infirm because it was based on "evidence of [racial] harassment not suffered by [the plaintiff]," it did not order a new trial. Rather, the court of appeals reduced the award to the maximum allowed by due process. *Id.* at 798-99.

The split in authority is unsurprising, because this Court recognized in *BMW* that there is a serious question about the proper remedy when a jury returns a large punitive damages verdict based on unconstitutional considerations. The question has remained, and it will come into sharp focus as this Court considers *Philip Morris v. Williams* next Term.

B. This Court Should Grant Review And Hold That A New Trial Is The Appropriate Remedy

Once a reviewing court determines that the jury's punitive damages award is based on unconstitutional considerations, and it cannot clearly determine what portion of the award is tainted, a new trial is the appropriate remedy. When the Constitution has been violated, courts must generally provide a remedy that redresses the violation. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 161-63 (1803). But a reduction in the punitive damages award to the highest amount allowed under the Constitution does not cure – or actually even address – the constitutional violation. The appropriate way to give the defendant redress is to allow an untainted jury to decide the proper amount of punitive damages.

This Court held in *BMW* and *State Farm* that an award can violate due process *either* because it exceeds the due-process maximum, *or* because it impermissibly bases punitive damages on conduct that did not harm plaintiffs. *See State Farm*, 538 U.S. at 416-17; *BMW*, 517 U.S. at 574-75.[8]

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[8] *See also, e.g.*, *White*, 312 F.3d at 1016 ("A punitive damages award that encompasses a defendant's extraterritorial conduct may be unconstitutional *even if* the size of the award itself, as compared to the compensa-

The Court thus recognized that large punitive damages awards pose two distinct due process concerns. First, a State may not constitutionally enforce a punitive damages award that exceeds a due process maximum, which is determined by reference to three guideposts that this Court has established. *See State Farm*, 538 U.S. at 418-19. Second, a State may not allow a jury to punish a defendant for harm to non-parties. *Id.* at 421.

These two limitations on punitive damages require different remedies. In the first situation – substantive excessiveness – reviewing courts ensure that punitive damages awards do not exceed the maximum permitted by the Constitution by reducing the awards. A reviewing court may fully remedy an excessive award by reducing it, because the court knows how much the (properly charged) jury awarded, and it is the reviewing court's responsibility to determine the constitutional maximum. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (mandating *de novo* review of the constitutionality of punitive damages awards).

But in the second situation – improper evidence or instructions – a reduction in the award to the constitutional maximum does nothing to remedy the error. That is because the reviewing court has no way of knowing what weight the jury gave to the improper considerations and thus what portion of the verdict is infected. *See, e.g.*, *White*, 312 F.3d at 1016 ("For all we know, the jury would have applied a much lower ratio than . . . the sixty-six to one that the jury initially chose."). The jury's verdict provides no helpful starting point because it is necessarily tainted by the trial error. Attempting to "cure" a jury's consideration of improper conduct in awarding punitive damages by reducing the amount

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tory damages, is not outside the bounds of due process." (emphasis added)).

of the award makes as much sense as trying to remedy the use of a coerced confession in a criminal trial by reducing the defendant's ultimate sentence.

Indeed, this Court has long recognized that the common law procedure of remittitur may only be used when the reviewing court is able to identify the untainted portion of the verdict. For example, in *Hansen v. Boyd*, 161 U.S. 397, 411-12 (1896), this Court noted that remittitur is allowed only if the court can "clearly distinguish and separate" the "erroneous part" of the judgment. Similarly, in *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889), the Court noted that "if the pleadings and the verdict afforded the means of distinguishing part of the plaintiff's claim from the rest, this court might affirm the judgment upon the plaintiff's now remitting that part." Those common-law limitations should apply equally to the remedy for a due process violation. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("[A]brogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause.").

This case vividly illustrates why reducing the punitive damages award cannot cure the serious errors made by the trial court below. The Court of Appeal recognized that the plaintiffs improperly urged the jury to award punitive damages based on potential harm to the general public – despite the lack of reckless conduct toward the plaintiffs – and that error "contribut[ed] to [the jury's] exorbitant punitive damage award." App. 54a. Yet the court did not order a new trial. Instead, it reduced the punitive damages award to twice the compensatory award, without *any* suggestion that the reduced amount even approximated what the jury would have awarded in the absence of the improper evidence. *Id.* at 57a. For all the court knew, the jury might have awarded *no* punitive damages based solely on plaintiffs' property dam-

age.[9] When a jury's verdict is infected by the consideration of improper evidence, reduction of the verdict to the maximum allowed by due process does nothing to ensure that the defendant has not been punished based on unconstitutional considerations. A new trial is the appropriate remedy.

III. THE LOUISIANA COURT OF APPEAL'S IMPOSITION OF A 2:1 RATIO OF PUNITIVE TO COMPENSATORY DAMAGES DISREGARDS THIS COURT'S TEACHING IN *STATE FARM* AND ADDS TO THE CONFUSION IN THE LOWER COURTS

Wholly apart from the Court of Appeal's error in failing to identify and remedy the jury's improper consideration of harms to non-parties, the punitive damages award in this case is excessive. This Court recognized in *State Farm* that compensatory damages have a deterrent function, and that when compensatory damages are substantial, a State may have no further interest in punishing and deterring a defendant. In those cases, the Court suggested, the maximum permissible ratio of punitive to compensatory damages is 1:1. Yet there is confusion in the lower courts regarding when the 1:1 upper limit is appropriate. This Court should grant the petition to provide clarity on this issue.

A. The Decision Below Disregards *State Farm* And Highlights A Split In The Lower Courts Regarding The Permissible Ratio When Compensatory Damages Are Substantial

The punitive damages award of $112 million is enormous, and it was affirmed despite the fact that plaintiffs were

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[9] A jury generally has the discretion to award zero punitive damages, even when it finds that the factual predicate for punitive damages has been established. *See* 1 Dan B. Dobbs, *The Law of Remedies*, § 3.11(1), at 458 (2d ed. 1993); *see also, e.g.*, *Smith v. Wade*, 461 U.S. 30, 52 (1983).

awarded $56 million in remediation costs, which far exceeded their actual loss, which is at most the $1.5 million value of their property. The Court of Appeal's approval of a 2:1 ratio of punitive damages cannot be squared with *State Farm*, which teaches that a 1:1 ratio is appropriate in this case.

In *State Farm*, this Court addressed the purposes that are served by punitive damages awards – punishment and deterrence. It recognized that a substantial compensatory damages award significantly advances those purposes in itself: "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, *after* having paid compensatory damages, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence." 538 U.S. at 419 (emphasis added). Where "compensatory damages are substantial," as with the $1 million compensatory award in *State Farm*, there is significant punishment and deterrence even before any amount of punitive damages are awarded. *Id.* at 425. As a result, if punitive damages are necessary for punishment and deterrence even after a large compensatory verdict, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

The lower courts have given varying weight to this aspect of *State Farm*, with some strictly adhering to a maximum ratio of 1:1 in cases of substantial compensatory damages, and others disregarding it entirely. For example, several courts have limited the ratio of punitive to compensatory damages to roughly 1:1 when compensatory damages are substantial – even in cases involving serious physical harm or intentional misconduct. *See, e.g.*, *Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 667-68 (6th Cir. 2005) ($2.5 million in punitives on $2.2 million in compensatories for sexual harassment and intentional infliction of emotional

distress); *Estate of Moreland v. Dieter*, 395 F.3d 747, 757-58 (7th Cir. 2005) ($27.5 million in punitives on $29 million in compensatories for beating and death); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) ($5 million in punitives on $4 million in compensatories for design defect that caused illness and death); *Stamathis v. Flying J, Inc.*, 389 F.3d 429, 443 (4th Cir. 2004) ($350,000 in punitives on $250,000 in compensatories for defamation and malicious prosecution); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) ($600,000 in punitives on $600,000 in compensatories for race discrimination in employment).

Other courts have sanctioned much higher ratios in cases of substantial compensatory damages, effectively ignoring *State Farm*. *See, e.g.*, *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1371-72 (Fed. Cir. 2003) (3:1 ratio based on $15 million in compensatories for patent infringement and related claims); *Bullock v. Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140, 176 (Cal. Ct. App. 2006) (33:1 ratio based on $850,000 in compensatories for products liability and fraud); *Williams v. Philip Morris*, 127 P.3d at 1182 (Or. 2006) (97:1 ratio based on $800,000 in compensatories for fraud).

B. This Court Should Grant Review And Instruct That The Maximum Permissible Ratio Of Punitive To Compensatory Damages In This Case Is 1:1

This Court should use this case as a vehicle to clarify where the outermost limit of due process lies when compensatory damages are substantial.

In this case, the $112 million punitive damages award far exceeds the limits of punishment and deterrence allowed under the Due Process Clause. As the Court of Appeal recognized, the $56 million compensatory damages award is undeniably "substantial" within the meaning of *State Farm*.

App. 53a, 57a. And the Court of Appeal acknowledged *State Farm*'s teaching that a 1:1 ratio is the maximum allowed under such circumstances. *Id.* at 53a. Indeed, the court all but sanctioned a 1:1 ratio of punitive to compensatory damages when it stated that, in light of the "substantial" compensatory damages award and the fact that "plaintiffs claimed only property damage, and no physical harm," "a punitive damages award closer to the amount of compensatory damages" was appropriate. *Id.* at 53a, 57a.

Yet the Court of Appeal, without any explanation, imposed a 2:1 ratio instead. But this is the paradigm case for zero punitive damages, or at most a 1:1 ratio of punitive to compensatory damages. It is undisputed that plaintiffs suffered only economic injury, *id.* at 50a, and the $56 million award allows (but does not require) them to completely remediate the property to their own standards. In light of the type of injury and the substantial compensatory damages award that afforded "complete compensation," 538 U.S. at 426 – and then some – there is no justification for further punishment and deterrence of ExxonMobil. Thus, the maximum permissible ratio in this case is 1:1, and it makes little sense for punitive damages to be imposed in any amount.

Importantly, plaintiffs' actual harm for ratio purposes is at most the actual value of the property – $1.5 million – not the $56 million awarded for plaintiffs to use to remediate their property if they so choose. The $56 million award is a grossly inflated measure of the harm to the plaintiffs. It is many times the cost of remediating the property to the satisfaction of the Louisiana Department of Environmental Quality ("DEQ").[10] In fact, the DEQ entered this litigation in

[10] The cost to remediate the property to Louisiana Department of Environmental Quality ("DEQ") standards for unrestricted use – rather than plaintiffs' standards – was far less than the $56 million award. At trial, ExxonMobil's expert witness stated that the cost to remediate the

support of ExxonMobil to point out that trial courts that "fail to follow or apply DEQ regulations in cases involving environmental remediation," result in inflated compensatory damages awards like the one in this case, which in turn result in inflated punitive damages awards. Brief of *Amicus Curiae* Louisiana DEQ et al. at 5, *Grefer v. Alpha Technical*, No. 05-C-1590 (La. June 23, 2005). Indeed, the punitive damages award in this case is particularly inflated in light of the fact that the vast majority of NORM was placed on plaintiffs' property well before punitive damages were even allowed in Louisiana. *See infra* note 2.

This Court has directed the lower courts to judge the proportionality of a punitive damages award by comparing the "*harm suffered by the plaintiff* and the punitive damages award." *State Farm*, 538 U.S. at 418 (emphasis added). In this case, plaintiffs suffered only economic harm, and the maximum economic harm plaintiffs suffered is the loss of the value of their property – $1.5 million. The remediation costs – which are more than 35 times the value of plaintiffs' property – do not represent actual harm to plaintiffs, but are based on plaintiffs' desire to remediate their property to their own personal standards, rather than DEQ standards for unrestricted use. This Court should limit the amount of punitive damages to the amount of the plaintiffs' harm, which is approximated by the $1.5 million value of their property. A contrary result would allow the plaintiffs to circumvent the *State Farm* protections by obtaining a grossly inflated compensatory award, which in turn would allow a grossly excessive punitive damages award, even when using a single-digit multiplier.

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property to comply with DEQ standards was $46,000. App. 35a. One of plaintiffs' own expert witnesses estimated that the cost to comply with DEQ standards was $1,387,310. *Id.* at 36a.

The punitive damages award in this case raises several serious constitutional questions left unanswered by *BMW* and *State Farm*. Those questions have percolated in the lower courts for a number of years and created significant splits in authority. Indeed, this Court has already agreed to resolve one of the issues next Term, in *Philip Morris USA v. Williams*. The Court should grant the petition in this case to consider, with *Williams*, both the proper remedy for improper consideration of harms to non-parties and the substantive limits on an award of punitive damages when compensatory damages are substantial. In the alternative, the Court should hold this petition pending its decision in *Williams* and enter an appropriate order once that case has been decided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 29, 2006

APPENDIX

APPENDIX A

LOUISIANA COURT OF APPEAL OPINION

No. 2002-CA-1237
COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

* * * * *

JOSEPH GREFER, CAMILLE GREFER, ROSE MARIE GREFER HASSI AND HENRY GREFER,

V.

ALPHA TECHNICAL, ET AL.

* * * * *

APPEAL FROM

CIVIL DISTRICT COURT, ORLEANS PARISH

NO. 97-15004, DIVISION "A"

HONORABLE CAROLYN GILL-JEFFERSON, JUDGE

* * * * *

JUDGE LEON A. CANNIZZARO, JR.

* * * * *

(COURT COMPOSED OF JUDGE MICHAEL E. KIRBY, JUDGE MAX N. TOBIAS, JR., AND JUDGE LEON A, CANNIZZARO, JR.)

MARCH 31, 2005

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AMENDED AND, AS AMENDED, AFFIRMED

The defendants, Exxon Mobil Corporation ("Exxon") and Intracoastal Tubular Services, Inc. ("ITCO"), and the plaintiffs, Joseph Grefer, Camille Grefer, Rose Marie Grefer Haase,[1] and Henry Grefer ("the Grefers"), appeal from a district court judgment rendered in accord with a jury verdict, awarding the Grefers compensatory and punitive damages as a result of the defendants' contaminating their immovable property[2] with radioactive material. Exxon also appeals from the district court judgment denying its exception of prescription.

BACKGROUND HISTORY

The operations of most major oil companies are integrated to include exploration and production, refining, and marketing of oil and gas. In the production phase, a well is drilled down to oil bearing sand, casing is cemented in the hole, tubing is run down the hole, and the tubing and casing

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[1] The plaintiffs' original petition refers to Rose Marie Grefer Haase as Rose Marie Grefer Hassi.

[2] The immovable property at issue was part of a larger tract of land purchased by the plaintiffs' great grandfather in 1875 and since then has remained in the Grefer family. The plaintiffs acquired the naked ownership of three-fourths (3/4ths) of the immovable property in February 1945 upon the death of their father, Archibald J. Grefer, Sr., and full ownership of the entire tract in March 1996 upon the death of their mother, Camille Claire Antoine Grefer.

are perforated at the level of the oil bearing sand to help bring the oil and natural gas to the surface. A section of the tubing is 2 to 3 inches in diameter and 30 feet long. The tubing is screwed together, and depending on the depth of the hole, could involve a string of tubing thousands of feet deep. Pressure underground forces oil and gas through the perforated casing and tubing up to the wellhead at the surface. At that point, separator tanks are used to separate the oil and gas, the oil is piped to a refinery for further processing into gasoline, diesel fuel, jet fuel, etc., and the natural gas is sent to a gas processing plant to separate the various components.

As time goes by, water from underground also mixes with and comes to the surface with the oil and gas. The water usually only appears in mature fields since it is heavier than oil and is generally not "produced" until much of the oil reservoir has become depleted. This water is referred to as "produced water" since it is "produced" up through the well. "Produced water" historically has been pumped back into the ground, or discarded in estuaries.

In the early 1900s, the oil industry discovered that the underground water leached certain mineral salts out of the earth's crust and the "produced water" then carried those mineral salts in solution up the tubing toward the surface. As the water came through the perforations and rose up the tubing, the change in pressure and temperature caused those mineral salts to precipitate out of solution and form a scale or crust on the inside of the tubing, and also in the separator tanks at the surface near the wellhead. As scale built up inside the tubing, the production rate of oil and gas slowed down as the flow path became increasingly constricted. When this occurred the oil company extracted the tubing from the well and sent it to a pipe yard where a cleaning contractor mechanically reamed the inside of the tubing to return it to its original diameter.

As early as 1914, the oil companies were aware that the chemical composition of the scale was primarily "barium sulfate." In the 1940s, chemical dictionaries identified "radium sulfate" as commonly being a co-precipitate with "barium sulfate." Several years later, in 1953, in a geological study done for the United States Atomic Energy Commission, radium sulfate was identified as the radioactive scale precipitate in oil field equipment used in southeastern Kansas oil fields. It was then that the oil industry learned that radium sulfate in small percentages was being co-precipitated with the scale's chief components, non-radioactive barium sulfate, strontium sulfate, calcium sulfate, and calcium carbonate.

In July 1971, representatives from Phillips Petroleum Company notified Exxon that it had found low-level radioactive deposits inside production equipment in its gas plants. Thereafter, Exxon undertook an investigation of its own gas plants. During the course of its investigation, Exxon found low-level radioactive deposits in varying amounts inside pumps and compressors in most of the gas plants. Exxon concluded that the source of the radioactivity was a radioactive gas entering the gas plants with the natural gas stream coming from the wellhead. Several years later, in 1977, the oil companies, including Exxon, learned that other radioactive materials had been identified in equipment in a Shell Oil refinery in the United Kingdom ("U.K.").

In 1981, in a routine well logging operation on two Occidental Petroleum Corporation platforms in the North Sea, drillers registered elevated levels of radioactivity from the radioactive scale in equipment on the platforms and the tubing in the well holes. The levels of radiation required Occidental to report the discovery to U.K. governmental authorities. The National Radiological Protection Board ("NRPB"), under contract to the U.K. government, did further testing and identified the radioactive component as radium-226, in

the form of radium sulfate, co-precipitated with barium sulfate, calcium sulfate, and strontium sulfate. Radium-226 has a half-life[3] of approximately 1,600 years.

All major oil companies operating in the North Sea, including Exxon, were immediately made aware of Occidental's discovery through the United Kingdom Offshore Operators Association ("UKOOA"), the oil industry trade association. As a result of the discovery, the U.K. Government held a major conference in 1983 for the oil companies dedicated solely to the NORM[4] problem. In 1985, the UKOOA Safety Committee published NORM safety guidelines and a NORM Reference Manual, which were distributed to all oil companies.[5]

On April 10, 1986, Chevron identified radium-226 in oilfield equipment at a well site near Brookhaven, Mississippi. As a result of Chevron's discovery, Exxon conducted surveys at four Exxon Mississippi well sites in June 1986 and found radium-226 at those sites. Later that month, Exxon representatives met with other oil company representatives at the Alabama/Mississippi Mid-Continent Oil & Gas Association meeting to discuss the radioactive scale problem. Following the meeting, Exxon industrial hygienist, Mr. Lindsay

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[3] Half-life is the time required for half of the atoms of a radioactive substance to decay. No two substances have the same half-life. For example, uranium-238 has a half-life of approximately .5 billion years; thorium-234 has a half-life of 24 days; and tellurium has a half-life of 4.2 minutes. Nearly all decay products are themselves radioactive, giving rise to decay chains that eventually end in a stable nuclide.

[4] "NORM" is the acronym for Naturally Occurring Radioactive Material.

[5] The UKOOA NORM safety guidelines covered the transportation and disposal of contaminated equipment, training of personnel, and the use of qualified and experienced de-scaling contractors. The NORM Reference Manual outlined the systematic approach oil companies were to follow to identify wells with radioactive scale.

Booher, reported to Mr. M.F. Terrell, a production manager for Exxon's Eastern Division, which covered Louisiana, Mississippi, Alabama, and Florida, advising him what he had found. In a letter dated June 19, 1986, Mr. Booher informed Mr. Terrell that where oilfield equipment was opened up for maintenance, inspection, and cleaning, there would be a human health concern, and if equipment contaminated with radioactive scale was turned over to contractors for cleaning, those contractors had to be notified of the presence of radioactivity. ITCO was Exxon's main cleaning contractor. Over the next several months, Exxon prepared a videotape and a letter advising cleaning contractors of the NORM problem and how to manage it.

On March 27, 1987, Exxon representatives met with Mr. John Hooper, president of ITCO, and other ITCO employees, to inform them of the NORM problem. At that time, Exxon played the video and gave them a set of procedural safety guidelines prepared by Mid-Continent Oil & Gas Association to follow when handling NORM contaminated equipment. The focus of the Exxon video and safety procedures was on precautions to prevent workers from breathing or ingesting airborne dust. At that time, Exxon's representatives made no mention of the possible buildup of radioactive scale on ITCO's premises even though it knew the pipe scale had been accumulating on the premises for years and had learned in June 1986 that it was hazardous.

Following the meeting, Mr. Hooper decided that ITCO would not clean any more piping/tubulars that contained NORM, and he informed Exxon of his decision. According to its guidelines, Exxon determined that piping/tubulars with NORM levels reading 5pCi/g (five picoCuries per gram) "above background"[6] were deemed contaminated.[7] Mr.

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[6] Under certain conditions, the levels of radiation caused by the radium in scale exceed the normal background levels of radiation from the earth and the sun, to which everyone is exposed.

Hooper then had the Exxon piping/tubulars monitored as they entered the ITCO yard to verify that they were below the 5pCi/g threshold. Piping/tubulars that were above the threshold were segregated to an area in ITCO's lower yard that was leased to Exxon. This area was fenced off and posted. Mr. Hooper also surveyed the piping/tubulars in the pipe racks on the premises to determine if they registered any elevated NORM levels. The piping/tubulars in the racks that had elevated levels of radioactivity were moved to the segregated area. The survey of the ITCO yard, which included the Grefer tract, did not register above background levels with the exception of the two following areas: 1) the ground near an inspection shed outside of the Grefer property, and 2) the ground where the pipe cleaning machine was situated on the Grefer property.

Shortly thereafter, ITCO built a Controlled Environmental Cleaning ("CEC") unit to clean NORM contaminated pipe. The unit had a special dust collection vacuum system, and ITCO demonstrated it for Exxon hygienists and engineers in the summer of 1987. Exxon requested several minor modifications, which ITCO made. However, no one from Exxon ever informed Mr. Hooper that the unit had been approved. Thus, ITCO never used it commercially. Sometime

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[7] Three types of radiation measurement acronyms are important to an understanding of this case. The first is microentgens per hour (uR/hr), which is the reading one would get from a geiger-type counter or survey meter, measuring the amount of radiation in the air at any specific point. See, James R. Cox, *Naturally Occurring Radioactive Materials in the Oil Field: Changing the NORM,* 67 Tul. L. R. 1197 (1993), note 6 at 1202. This less thorough measurement may be taken anywhere in the field and is known as an external dose rate. *Id.* The second measurement is pico-Curies per gram (pCi/g), which measures the radioactivity of solid media such as soil or scale, and this test must be performed with sophisticated laboratory techniques. *Id.* at 1201. The third measurement is millirems (mR), which concerns the dose of radiation to the body. *Id.* at 1202.

thereafter, ITCO's business began to steadily decline, and Mr. Hooper decided to shut down operations.

FACTS AND PROCEDURAL HISTORY OF THE CASE

ITCO was founded in 1935 as an oil and gas service company. The business was located on Peters Road adjacent to the Harvey Canal in Harvey, Louisiana. Initially, ITCO stored and warehoused oil field production pipe for Humble Oil & Refining Company (a predecessor to Exxon). Eventually, ITCO expanded its services to include the cleaning, inspecting, testing, threading and transporting of pipe for Exxon and other oil companies. To accommodate its expanding operation, in 1968, ITCO began leasing several parcels of adjacent land from Mrs. Camille Antoine Grefer ("Mrs. Grefer"). Between 1968 and 1992, ITCO had leased eight separate tracts of the Grefer property.[8] Beginning in 1984, however, ITCO chose not to renew five of the leases because it had purchased an adjacent 240-acre tract of land for its pipe yard activities.

Due to the decline in business, in June 1992, Mr. Hooper met with Judge Joseph Grefer to discuss terminating ITCO's three remaining leases, G-2, G-3 and G-6. Mr. Hooper informed Judge Grefer that he wanted to cease ITCO's business operations at the end of August 1992. He told Judge Grefer that he would pay the monthly rentals through that date, and asked Judge Grefer if his mother, Mrs. Grefer, would forego the additional three years of rental payments due under the leases. Judge Grefer agreed to recommend this to his mother.

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[8] The Grefer property is a continuous tract of land measuring 1,426,500 square feet, or approximately 33 acres, that runs from 16th Street to Breaux Avenue and from Peters Road to Pailet Avenue in Harvey, Louisiana. The leased tracts are referred to as G-1 through G-4 and G-6 through G-9; there was no G-5 lease.

After discussing the matter with her son, Mrs. Grefer agreed to terminate ITCO's remaining leases in exchange for $23,193.51. Mr. Hooper then contacted ITCO's attorney, Daniel Lund,[9] who prepared a "Release, Settlement and Termination Agreement" for the parties to sign. After reviewing the proposed release agreement and finding it insufficient, Judge Grefer spoke to Mr. Lund sometime between June 30 and July 2, 1992, and asked him at that time to insert a clause in the release agreement to reserve the lessor's rights and claims against third parties. Edmond Haase, III, Mrs. Grefer's grandson and a colleague of Mr. Lund, brought the revised release agreement to Judge Grefer and suggested that he call Mr. Hooper about possible radiation on the property. Shortly thereafter, Judge Grefer called Michael Hooper, Mr. Hooper's son, who assured him that an inspection of the property disclosed no radioactive contamination. Based on Michael Hooper's assurances, Judge Grefer approved the revised release agreement and Mrs. Grefer signed it on July 13, 1992. Judge Grefer then returned the signed agreement to Mr. Lund, who forwarded it to Mr. Hooper for his signature. The fully executed agreement was then recorded in the Conveyance Records of Jefferson Parish.

Several years later, in September 1996, an attorney representing a former ITCO employee contacted Judge Grefer, seeking permission to enter the property formerly leased to ITCO to test for radioactive contamination. Judge Grefer allowed the property to be tested and the following month he received the sampling report and laboratory analysis confirming that the property was contaminated with radium.

In August 1997, the Grefers filed suit against Exxon, ITCO, and Alpha Technical Services, Inc. ("Alpha Techni-

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[9] Daniel Lund, P.L.C., is a partner in the Law Offices of Montgomery, Barnett, Brown, Read, Hammond & Mintz.

cal"),[10] among others, alleging that they had recently discovered their property was contaminated with Technologically Enhanced Radioactive Material ("TERM")[11] from scale deposited on used oilfield piping/tubulars that were cleaned and/or maintained by ITCO and Alpha for Exxon and other oil companies. They claimed that the defendants knew that the TERM contained hazardous, toxic and carcinogenic substances and was present in both inshore and offshore oil producing wells but never informed the public of the safety hazard. As to Exxon and the other defendants, the plaintiffs asserted causes of action in negligence, strict liability, absolute liability, nuisance, and fraud and sought compensatory damages for loss of use and remediation of the property as well as punitive damages pursuant to La. C.C. art. 2315.3. The plaintiffs also asserted a breach of contract claim against ITCO.

ITCO subsequently filed a cross-claim against Exxon, alleging that pursuant to its contracts with Exxon, Exxon was required to provide ITCO with any pertinent information on any known toxic and hazardous substances contained in its oilfield piping/tubulars. Exxon was also required to meet with ITCO on a regular basis to determine whether any changed condition or specific health or safety hazards would

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[10] Alpha Technical, an oilfield service company, also had leased property from the Grefers.

[11] The plaintiffs' use the acronym TERM to refer to the radioactive scale deposits found in the used oilfield tubulars. The defendants, on the other hand, refer to the deposits as NORM. As mentioned, *infra*, the radioactive scale consists of radium-226, radium-228, and their daughter products. To the extent radium is found in used oilfield tubulars, it is naturally occurring and may be technologically enhanced. It is sometimes referred to as Technologically Enhanced Naturally Occurring Radioactive Material ("TENORM"), which is defined as "natural sources of radiation which would not normally appear without some technological activity not expressly designed to produce radiation." LAC33:XV.1417.A.1.

be encountered by ITCO during its pipe cleaning operations. ITCO also alleged that these contracts provided a "Distribution or Risks" between the parties wherein Exxon contractually assumed the risk for its own negligence, willful misconduct, and/or strict liability. ITCO claimed that Exxon sent the majority of its used tubulars from its Eastern and Offshore Divisions to ITCO to clean, and that Exxon had knowledge of radioactive scale deposits in some of the piping/tubulars prior to March 27, 1987, the date Exxon first disclosed to ITCO the existence of NORM in the tubulars. ITCO alleged a claim against Exxon for the NORM deposited during ITCO's pipe/tubular operations at ITCO's owned or operated sites based upon Exxon's breach of the health and safety disclosure provisions of the ITCO/Exxon contracts. ITCO further alleged that in the event it would be cast in judgment in favor of the Grefers on the main demand, it would be entitled to full indemnity and/or contribution from Exxon.

Prior to trial, the plaintiffs dismissed all defendants other than ITCO and Exxon. After a five-week trial, the jury returned a verdict in favor of the Grefers and awarded them compensatory damages in the amount of $56,145,000.00, which included $145,000.00 in general damages and $56,000,000.00 in restoration costs (special damages), as well as exemplary (punitive) damages in the amount of $1,000,000,000.00 (one billion dollars). In answers to the jury interrogatories, the jury allocated 85% of the fault to Exxon, 5% to ITCO, 5% to Alpha Technical and 5% to OFS, Inc.[12] The jury also answered special interrogatory number 11 in favor of ITCO, holding that "ITCO is entitled to recover from Exxon all amounts awarded against ITCO under

[12] ITCO also had filed a third party demand against OFS, Inc. and Oilfield Testers, Inc., alleging that these two licensed NORM handling facilities conducted operations near or adjacent to the Grefer tract that resulted in NORM contamination to the property.

its counterclaim against Exxon[.]" A month after the jury returned its verdict, the trial court held a separate hearing to consider the merits of Exxon's exception of prescription. Following the hearing, the trial court rendered a judgment denying the exception and a judgment in accord with the jury's verdict. It is from these judgments that Exxon, ITCO and the Grefers appeal.

ASSIGNMENTS OF ERROR

Exxon raises the following seven assignments of error on appeal:

1. The trial court erred in denying Exxon's exception of prescription;
2. The trial court judgment is based on an unlawful jury verdict;
3. The trial court erred in refusing to instruct the jury on the Louisiana Department of Environmental Quality ("DEQ") standards governing NORM limits for unrestricted-use land;
4. The trial court erroneously instructed the jury on exemplary damages though the plaintiffs' cause of action accrued before the legislature enacted Louisiana Civil Code article 2315.3;
5. The jury's award of exemplary damages was manifestly erroneous because the evidence does not support a finding that Exxon engaged in wanton or reckless conduct;
6. The jury's punitive damages award is unconstitutional, excessive, and must be vacated or reduced to comport with due process; and
7. The trial court erroneously instructed the jury on ITCO's indemnity claim.

ITCO's single assignment of error is that the jury erred in finding it at fault. The Grefers sole assignment of error is that the trial court erred in refusing to attach prejudgment interest to the jury's punitive damage award.

DISCUSSION

Prescription

Exxon argues on appeal that the plaintiffs' claims had prescribed four years before they filed suit in 1997. Specifically, it argues that Judge Grefer admitted that he had acquired knowledge from his nephew, Mr. Haase, that there might be a problem with radiation on the property during ITCO's negotiations to terminate the three remaining leases and transfer the property back to Mrs. Grefer in 1992. This knowledge, Exxon contends, was sufficient to excite attention, prompt further inquiry, and commence the running of the one-year prescriptive period at that time.

The plaintiffs, on the other hand, contend that Judge Grefer made a reasonable inquiry in 1992 when, at the suggestion of his nephew, he asked Mr. Michael Hopper about the possibility of radiation on the property. Invoking the doctrine of *contra non valentem*, they argue that prescription could not have commenced at that time because Exxon had withheld from ITCO the results of subsurface surveys conducted at the ITCO yard prior to 1992 that disclosed radioactive contamination on the property. Also, the plaintiffs argue that because the radioactive material was hidden randomly, subsurface, they had no way of knowing their property was contaminated until they obtained actual knowledge of the contamination when Judge Grefer received the results of the radiation study conducted in October 1996.

When damage is caused to immovable property, the one-year prescriptive period commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage. La. C.C. art. 3493.

When an exception of prescription is filed, the burden of proof is on the party pleading prescription. *Lima v. Schmidt*, 595 So. 2d 624, 628 (La. 1992). If, however, prescription is evident on the face of the pleadings, then the burden shifts to the plaintiff to show that the cause of action has not prescribed. *Eastin v. Entergy Corporation*, 2003-1030, p. 5 (La. 2/6/04), 865 So. 2d 49, 54.

The rule of prescription is subject to the discovery rule of *contra non valentem agere nulla currit praescriptio*, which suspends the running of prescription during the period in which the cause of action was not known by or reasonably knowable by the plaintiff. *Plaquemines Parish Commission Council v. Delta Development Company, Inc.*, 502 So. 2d 1034 (La. 1987). The Louisiana Supreme Court set forth four instances where *contra non valentem* is applied to prevent the running of prescription: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting upon the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though this ignorance is not induced by the defendant. *Id.* at 1054-55. The Court, in *Jordan v. Employee Transfer Corp.*, 509 So. 2d 420 (La. 1987), clarified its application of *contra non valentem*, stating:

> Prescription will not begin to run at the earliest possible indication that a plaintiff may have suffered some wrong. Prescription should not be used to force a person who believes he may have been damaged in some way to rush to file suit against all parties who might have caused that damage. On the other hand, a plaintiff will be responsi-

> ble to seek out those whom he believes may be responsible for a specific injury.
>
> When prescription begins to run depends on the reasonableness of a plaintiff's action or inaction.

Id., 509 So. 2d at 423. Constructive knowledge or notice sufficient to commence the running of prescription, however, requires more than a mere apprehension that something might be wrong. *Landry v. Blaise, Inc.*, 2002-0822, pp. 5-6 (La. App. 4 Cir. 10/23/02), 829 So. 2d 661, 665-66. Prescription will commence only when the plaintiff knew or should have known by exercising reasonable diligence that tortious conduct occurred and that certain parties are responsible. *Id.* at 666.

At the post-trial prescription hearing, in addition to Judge Grefer's testimony, Exxon introduced into evidence the deposition testimony of Mr. Lund taken on January 9, 2001, and proffered the testimony of Mr. Haase as well as several documents evidencing Mr. Haase's legal representation of ITCO.[13] Exxon also asked the court to consider an affidavit executed by Mr. Lund.[14]

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[13] Exxon had subpoenaed both Mr. Haase and Omer F. Kuebel, Jr., another attorney from the Montgomery Barnett law firm, to testify but the trial court quashed the subpoenas because Exxon failed to list them as witnesses on the pre-trial witness list. As a result, Exxon was precluded from calling them as witnesses at the prescription hearing. Nonetheless, the trial court allowed Exxon to proffer statements that it believed Mr. Haase would have testified to if he had been allowed to testify. The proffered testimony provided that Mr. Haase had represented ITCO in several matters during his employment with the Montgomery Barnett law firm, including assisting ITCO in NORM related matters and negotiations with Exxon regarding the remediation of ITCO's upper yard; despite his knowledge of the radioactive contamination on the property, he did not inform his family that it might have contaminated their adjacent land.

[14] Mr. Lund executed an affidavit on November 28, 2000 that ITCO submitted in support of its motion for summary judgment and exception of prescription filed in December 2000. In the affidavit Mr. Lund

Judge Grefer testified at the prescription hearing that Mr. Hooper came to him in June 1992 to discuss terminating the leases because he was closing his business. He further testified that his nephew, Mr. Haase, who was representing ITCO at the time, brought him the final document prepared by the Montgomery Barnett law firm to formally terminate the leases and suggested that he contact Michael Hooper to discuss whether there was a problem with radiation on the property. Judge Grefer then called Mr. Michael Hooper, who assured him that he, personally, had inspected the property and found no radiation. According to Judge Grefer, he accepted Mr. Michael Hooper's representation and, based on their families' close business and personal relationship, had no reason to doubt his word. Judge Grefer also acknowledged that he had spoken to Mr. Lund after reviewing an initial draft of the lease termination agreement because he was concerned about reserving his mother's rights against any third parties who might be responsible for damage to the property. However, he testified that he did not recall ever discussing with Mr. Lund his concern about radiation or other environmental damage to the Grefer property.[15] Also,

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averred that in 1992 during negotiations with Judge Grefer regarding the cancellation of the ITCO lease, Judge Grefer expressed concern about radiation on the property and asked him to include a reservation of rights clause in the termination agreement. After the trial court denied the motion for summary judgment, ITCO abandoned its exception of prescription.

[15] At a January 3, 2001 deposition, Judge Grefer testified that Mr. Haase told him to call Mr. Michael Hooper because "'there may be a problem with the property.'" When asked whether or not Mr. Haase had told him there was a potential problem with radiation on the property, Judge Grefer replied, "I don't recall." Likewise, when asked whether the word "'radiation'" was ever used in his conversation with Mr. Michael Hooper, Judge Grefer again replied, "I don't recall." At a January 29, 2001 deposition, when questioned by Exxon's counsel about his conversations with Mr. Lund regarding the release for ITCO and whether there was a potential for environmental contamination on his family's property, Judge Grefer stated, unequivocally, "No, I had no conversation with

Judge Grefer denied ever visiting the ITCO premises in 1992 to observe the cleaning and remediation of an area around the pipe-cleaning machine.

Mr. Lund testified at his deposition that he had several phone conversations with Judge Grefer in late June and early July 1992 during which Judge Grefer asked him to include a reservation of rights provision in the release, settlement and termination agreement because he was concerned about radioactive contamination. Mr. Lund told Judge Grefer that ITCO had advised him that they had found an area on the property with a radioactivity reading above acceptable background levels in an area near the pipe cleaning machine; that the machine had been cleaned and that the area around it had been scraped with a bulldozer and the dirt was moved to another site. According to Mr. Lund, Judge Grefer then told him that he had been to the property himself and observed the work being done.[16]

Dan Lund about environmental contamination on the property." Exxon's counsel then asked, "But just to make sure I understand, it's not that you don't recall the conversation? You know you didn't have one?" Judge Grefer again responded, "I didn't have one."

[16] The exhibits attached to Mr. Lund's deposition included correspondence and notes from Mr. Lund's ITCO file, which the plaintiffs obtained through discovery. Mr. Lund identified two handwritten notations that he had made at the time he spoke to Judge Grefer. The first notation, which appears on a copy of the June 19, 1992 cover letter that Mr. Kuebel wrote to Judge Grefer advising him to review an attached draft of the revised settlement agreement, read "6/30 – Tel Joe – is Holding the Check what about environmental –." Mr. Lund explained that the notation, made on June 30, 1992, indicated that he had telephoned Judge Grefer, who was holding ITCO's check and was inquiring about environmental conditions on the property. The second handwritten notation, Mr. Lund explained, was made during a telephone conversation with Judge Grefer on July 2, 1992 and read "Telephone Joe Grefer, 10:00 a.m., told Joe – says he's concerned about radiation, put in agreement. No indication at this time. This is not intended to release or waive any rights against any party who may have responsibility."

After considering the evidence from the trial and the post-trial prescription hearing, the trial court determined that prescription was not evident on the face of the plaintiffs' petition and that Exxon had the burden of proof but did not satisfy its burden. In reasons for judgment, the trial court stated that she found both Judge Grefer and Mr. (John) Hooper were credible witnesses.[17] She determined that when Mr. Haase informed Judge Grefer of possible contamination in 1992, Judge Grefer made a reasonable inquiry of Mr. Michael Hooper and due to the long-term business and professional relationship between them, Judge Grefer was reasonable to rely upon Mr. Michael Hooper's representations that the property had been tested and there was no radioactive contamination. The trial court doubted that Judge Grefer, an attorney and former judge, would have allowed ITCO to terminate the lease three years early and as compensation receive only the rent due through August 1992 and a reservation of rights as to third parties if he had any knowledge of

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[17] Mr. Michael Hooper did not testify at trial but the parties stipulated that had he testified his testimony would have been the same as Mr. John Hooper's testimony. Mr. John Hooper testified at trial that after Exxon disclosed the NORM problem to ITCO in March 1987, ITCO discontinued the cleaning of any used piping/tubulars that were above the safe threshold. He further testified that ITCO surveyed its yard, including the Grefer tract, to determine if there were any elevated NORM readings on site. Piping/tubulars found in pipe racks that had elevated levels of radioactivity were moved to a segregated area in ITCO's lower yard. According to Mr. Hooper, the ITCO yard did not register above background levels with the exception of two areas, one outside an inspection shed and the other where the pipe-cleaning machine was situated on the Grefer property. Mr. Randy Minton, ITCO's radioactive safety officer, reported those areas presented no hazards since the primary safety concern discussed by Exxon with ITCO was the airborne dust which could be ingested by workers. Mr. Hooper testified that ITCO never knowingly cleaned any NORM contaminated pipe after March 27, 1987, and that when he transferred the property back to Mrs. Grefer in mid-1992, he was not aware of any unacceptable levels of radioactive scale on the property.

contamination in 1992. She also questioned the veracity of Mr. Lund's testimony that he told Judge Grefer in 1992 that ITCO knew that an area of the property was contaminated. The court opined that Mr. Lund's statement was against his client's (ITCO's) interest and "defied belief."[18]

When findings are based on determinations regarding the credibility of witnesses, the manifest error – clearly wrong standard demands great deference to the trier of fact's findings, for only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989). If the trial court's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.*

After reviewing the record, we find the trial court was correct in determining that prescription was not evident on the face of the plaintiffs' petition and that Exxon had the burden of proof but did not satisfy its burden by a preponderance of the evidence. Furthermore, we cannot say the trial court was clearly wrong in determining that Judge Grefer acted reasonably in relying on Mr. Michael Hooper's assurances that the Grefer property did not contain unaccept-

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[18] Mr. Lund initially made the sworn statement in his affidavit in November 2000, which ITCO submitted in support of its motion for summary judgment and exception of prescription. At that time, ITCO was making the same argument that Exxon made at the post-trial prescription hearing and asserts in this appeal, i.e., Judge Grefer knew or should have known by exercising reasonable diligence that the property was contaminated and that the defendants were responsible. Mr. Lund's statement certainly was not against his client's interest; rather it reinforced ITCO's claim that Judge Grefer had knowledge sufficient to commence the running of prescription in July 1992. In any event, whether or not the statement was against ITCO's interest is not germane to the issue at hand.

able levels of radioactive waste. The trial court made findings of fact based on her determination that both Judge Grefer and Mr. Hooper were credible witnesses, and her findings, are supported by evidence in the record. Thus, we cannot disturb the trial court's judgment overruling the defendants' exception of prescription.

Unlawful Jury Verdict

In its second assignment of error, Exxon argues that the judgment is based on an unlawful jury verdict, and the trial court reformed the verdict without legal justification. Specifically, Exxon contends that the transcript from the original jury polling disclosed that on interrogatory number 2 (whether Exxon's fault caused damage to the plaintiffs' property) only seven jurors answered, "yes." After reviewing his audiotapes, the court reporter, Mr. Joseph Catalano, amended the transcript to reflect that eight jurors voted "yes" and four voted "no." Mr. Catalano then certified the transcript as being "true and correct." Exxon subsequently obtained a copy of the certified transcript and discovered the vote tally on interrogatory number 2 was deficient, as only eight "yes" votes were recorded. Exxon notified the court of the deficiency. Meanwhile, the plaintiffs had filed a motion to correct the record pursuant to La. C.C.P. art. 2132 to reflect that juror number three, Mr. Emile Ferbos,[19] voted affirmatively to interrogatory number 2. Nearly a year after the jury rendered the verdict, the trial court granted the plaintiffs' motion and amended the official transcript to reflect that nine jurors had voted affirmatively on interrogatory number 2.

The plaintiffs argue that Exxon cannot contest the trial court's correction of the erroneous jury poll transcript be-

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[19] The original jury poll transcript of May 22, 2001 refers to Mr. Ferbos as "Mr. Provost" and the amended transcript of May 22, 2001 refers to him as "Mr. Ferbost."

cause Exxon failed to make a contemporaneous objection to the vote count on interrogatory number 2 at the time the jury was polled. Also, the plaintiffs point out that the trial court corrected the transcript based upon her recollection of the jury poll and the notes taken by Exxon's counsel at that time, which were consistent with the evidence proffered at the hearing on the motion to correct the record.

Louisiana Code of Civil Procedure article 1797(B) provides, "[i]f trial is by a jury of twelve, nine of the jurors must concur to render a verdict unless the parties stipulate otherwise." Article 2132 of the Code of Civil Procedure provides that a record on appeal which is incorrect or contains misstatements, irregularities or informalities may be corrected by the parties by stipulation, by the trial court or by the order of the appellate court. Furthermore, Code of Civil Procedure article 2088 confers upon the trial court jurisdiction to "correct any misstatement irregularity, informality, or omission of the trial record, as provided in Article 2132."

After the jury's verdict was read in open court, Exxon's counsel requested that the trial court poll the individual jurors as to each interrogatory. The original transcript of the jury poll reflects that initially seven jurors voted "yes" and five jurors, including Mr. Ferbos and Ms. Huyen Bui (juror number 8)[20] voted "no" on jury interrogatory number 2. At completion of the polling, Exxon's counsel informed the court that he had a problem with the vote on jury interrogatory number 9 regarding the cost to restore the plaintiffs' property; only eight jurors had voted "yes." The trial court met with counsel outside the presence of the jury and apparently determined the problem pertained to Ms. Bui's vote. When the trial court returned to the bench, she repeated in-

[20] Ms. Bui is referred to as "Hu Yong Wi" and "Ms. Wei" in the jury polling transcript, the amended transcript and in the trial court judgment correcting the record.

terrogatory number 9 to Ms. Bui, who responded "yes," giving the plaintiffs' the requisite nine votes on that interrogatory. Exxon's counsel then raised an objection to the inconsistencies in the jurors' responses to interrogatory numbers 12 and 13 even though the plaintiffs had at least nine votes in their favor on each.[21] No objection, however, was ever made to the vote on interrogatory number 2.

Several months later, after Exxon discovered the deficiency in the certified transcript of the jury poll, the trial court addressed the issue at a hearing on December 21, 2001, stating for the record:

> The court conducted the poll of each individual on each individual case and the numbers, and as the court will recall especially on question number two that it was only juror number two who answered it in the negative as I recall who answered it in the negative on every question.
>
> And when the polling was being done that counsel for the plaintiff specifically stopped the court on a particular question where the number was not correct and the court took corrective action at that time and that should be reflected in the transcript as well.[[22]]

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[21] Interrogatory numbers 12 and 13 pertained to whether or not Exxon was responsible for punitive damages and, if so, the amount thereof. Ten jurors voted to award the plaintiffs punitive damages but only nine agreed to the one billion dollar amount. The inconsistencies arose because two jurors, Ms. Denise Green and Mrs. Lois Washington, voted to award punitive damages but did not agree with the amount while one juror, Mr. Anthony Green, voted not to award punitive damages yet agreed to the one billion dollar amount.

[22] The record reflects that first, five jurors are recorded as having answered "no" to interrogatory number 2 (not one, as the trial court recollected); second, juror number 2, Ms. Sam, answered "yes" to interrogatory numbers 3,4, 5 and 6 (and not "no" on every question); and third, it was defense counsel (not plaintiffs' counsel) who stopped the court on a particular question when the number of votes was not sufficient on interrogatory number 9.

The court then allowed the attorneys to question Mr. Catalano about the certified trial transcript. Responding to questions from plaintiffs' counsel, Mr. Catalano stated that he had recently reviewed the audiotape and his contemporaneous stenographic notes of the jury poll and concluded that, while the audiotape was not very clear, his notes reflected that a change should be made in Ms. Bui's response to interrogatory number 2 from "no" to "yes," and that the certified transcript was otherwise correct. He also explained that Mr. Ferbos' vote on interrogatory number 2 was inaudible. The trial court then instructed Mr. Catalano to surrender the original audiotapes to the court for safekeeping and informed the attorneys that they would be allowed to listen to the audiotapes at a later date and that she would entertain motions to technically enhance the tapes if necessary prior to ruling on the issue.

Two months later, the plaintiffs filed a motion to correct the trial record pursuant to La. C.C.P. art. 2132, arguing that because neither the trial judge nor the attorneys present at trial noticed a polling deficiency on interrogatory number 2, it did not occur, and thus, the jury poll transcript should be corrected to reflect nine "yes" votes on interrogatory number 2.

At the hearing on the motion to correct held on April 19, 2002, the trial court allowed the plaintiffs to introduce into evidence the original tape recordings of the trial and the notes made by Exxon's counsel during the jury poll. The plaintiffs then proffered as evidence testimony by Mr. Catalano, a copy of an amended transcript prepared by him, the testimony and affidavit of Mr. Ferbos, and the testimony of both Mr. Scott Newman, an audio production specialist with Evidence Management, and Mr. Jeffrey Talbot, an audio engineer. Exxon proffered testimony by Mr. Leo "Jim"

Odom, an electrical engineer specializing in audio production.[23]

In granting the plaintiffs' motion, the trial court relied on her own polling of the jurors and the parties' failure to object to the responses to interrogatory number 2 and found that the official trial transcript, which recorded Mr. Ferbos' answer to interrogatory number 2 as "no," was incorrect. The trial court then rendered judgment, ordering Mr. Catalano to amend the certified transcript of the jury poll to correct the votes cast by Ms. Bui and Mr. Ferbos in response to interrogatory 2 from "no" to "yes" and to file the corrected transcript into the record of the court.

We find the trial court did not err in correcting the record pursuant to La. C.C.P. art. 2132. The notes taken by Exxon's counsel during the jury poll reflect that Ms. Bui voted "no" to interrogatory numbers 3 and 4 only, corroborating Mr. Catalano's testimony from the December 21, 2001 hearing that she had voted affirmatively on interrogatory

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[23] The proffered evidence indicates that Mr. Catalano and Mr. Newman returned to the courtroom on March 18, 2002 to listen to the original tapes, using a Macintosh computer to enhance the sound. The enhanced audiotape disclosed that Mr. Ferbos' answer to interrogatory number 2 was "yes" and Mr. Catalano amended the jury transcript accordingly. Mr. Talbot later obtained an audio file of the original recording from Mr. Newman and, at his request, used a broadband noise reduction computer program to "filter" or eliminate the background noise to better hear the recorded voices. After listening to the original audio file, both filtered and unfiltered, he determined that Mr. Ferbos and Ms. Bui both answered "yes" to the second interrogatory. Mr. Odom, listened to the same audio files using a wave frequency analysis software program and concluded that on interrogatory number 2 there were five "yes" votes, three "no" votes, and the remaining four votes were indistinguishable. In view of the fact that Mr. Catalano had Mr. Newman enhance the original audiotapes without counsel present and Mr. Ferbos' testified nearly a year after the jury was polled, the trial court did not abuse her discretion in excluding the proffered testimony, copy of the amended transcript, and affidavits into evidence.

number 2. As to Mr. Ferbos' responses, Exxon's counsel made no clear notation to indicate his vote on any interrogatory. The fact that counsel failed to indicate a "no" vote for Mr. Ferbos supports the plaintiffs' argument that he did in fact respond "yes" to interrogatory number 2, because the notes record the "no" votes of those jurors who voted "no" on the various interrogatories.

Restoration Damages

In its third assignment of error, Exxon argues that the trial court failed to properly instruct the jury on DEQ standards governing NORM remediation of land for unrestricted use.[24] Specifically, it contends that the trial court should have charged the jury that under DEQ standards land with NORM levels of 5 pCi/g or less above background required no remedial action, i.e., no "restoration." Although the proposed charge referenced exemplary damages, Exxon contends the trial court's failure to give it gave the jury unfettered discretion in awarding restoration damages, and as a result, the jury disregarded evidence that only minimal effort and cost was needed to render the plaintiffs' property completely fit for unrestricted use. Alternatively, Exxon complains that the jury charge included no requirement of "reasonableness." Thus, Exxon contends the $56 million restoration award is unreasonable and manifestly erroneous in view of the evidence that the Grefer property is valued at only $1.5 million. Based on these errors, Exxon requests a *de novo* review.

The plaintiffs counter that Exxon objected to the trial court's refusal to give its proposed jury charge regarding DEQ standards on the basis of exemplary rather than restoration damages, and, therefore, waived its right to appeal the

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[24] The Louisiana limit for unrestricted use of sites containing TENORM is five picocuries per gram (5 pCi/gm) above background of radium-226 or radium-228. LAC33:XV.1417.A.1.

restoration award on the basis of an insufficient jury instruction.

The record reflects that the trial court held a conference on May 10, 2001, at which the parties apparently debated proposed jury charges, but the court reporter verified that the transcript from the conference is missing. The transcript from a conference held on May 18, 2001, the day the jury was charged, nonetheless reflects that Exxon's counsel had asked for a charge limiting restoration damages and objected when it was denied. Thus, Exxon preserved its right to raise the issue on appeal.

La. C.C.P. art. 1792(B) requires the trial court to instruct the jurors on the law applicable to the cause submitted to them. The sufficiency of a jury charge must be determined in light of the charge as a whole. The court is not required to give the precise instruction submitted by either party, but must give instructions that properly reflect the applicable law in light of the facts of the particular case. Even if the requested instructions are fair statements of the law, the trial court need not include them verbatim but may strike a fair balance so that no one issue is unduly emphasized. *Baxter v. Sonat Offshore Drilling inc.*, 98-1054, p. 6 (La. App. 1 Cir. 5/14/99), 734 So. 2d 901, 906. Whether to include a requested jury instruction is a matter within the wide discretion of the trial court, and its decision will not be overturned absent an abuse of that discretion. *Wingfield v. State, Dept. of Transportation and Development*, 2001-2668, p. 17 (La. App. 1 Cir. 11/8/02), 835 So. 2d 785, 801. The discovery of an error in the instructions does not by itself justify a *de novo* review. The appellate court must measure the gravity of the error, while considering the instructions as a whole and the circumstances of the case. *Id.* A verdict should not be set aside unless the error in the instructions misled the jury to such an extent so as to prevent it from doing justice. *Id.*; *Baxter*, 98-1054 at p. 6, 734 So. 2d at 906.

Both parties, to some extent, rely on the Louisiana Supreme Court's decision in *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Service Company*, 618 So. 2d 874 (La. 1993). In that case, the U.S. Department of Housing and Urban Development ("HUD") acquired a 13-building apartment complex in 1976 in consideration of the cancellation of a $3.3 million loan. In 1977, HUD entered into an agreement with the Roman Catholic Church for the Archdiocese of New Orleans ("Church") to manage the housing complex in order to provide federally subsidized housing to low-income families; HUD spent $3 million renovating the complex from 1977 through 1980. In 1981, the Church agreed to acquire the complex for $1.7 million, subject to the resolutory condition that if the Church failed to maintain the complex as a facility for low-income families for 15 years, the complex's ownership would revert to HUD. In 1983, a fire destroyed one of the buildings in the complex; the fire was caused by a malfunction in the defendant's (Louisiana Gas Service Company's) gas regulation equipment in the building, which caused a natural gas surge. The defendant acknowledged its fault, thus making the only issue for trial the quantum of damages. The trial court ruled that the Church's recovery was limited to the amount it expended to restore the building to its pre-fire condition less depreciation. The Court ultimately concluded that the expenditure of $232,677.00 for restoration without depreciation of one building was reasonable albeit the Church had paid but $1.7 million for the property and the renovated building had a longer useful life.

The Supreme Court stated that "[t]he single issue presented is whether the lower courts erred in limiting plaintiffs' damages to replacement cost, less depreciation, rather than awarding the plaintiffs the full cost of restoration that had been reasonably incurred." *Id.* at 876. The Court concluded that:

> [A]s a general rule of thumb, when a person sustains property damage due to the fault of another, he is entitled to recover damages including the cost of restoration that has been or may be reasonably incurred, or, at his election, the difference between the value of the property before and after the harm. **If, however, the cost of restoring the property in its original condition is disproportionate to the value of the property or economically wasteful, unless there is a reason personal to the owner for restoring the original condition or there is a reason to believe that the plaintiff will, in fact, make the repairs, damages are measured only by the difference between the value of the property before and after the harm. Consequently, if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building.**

Id. at 879-80. (Emphasis supplied).

The Court also recognized that damage awards between private litigants for costs of remediation of environmental problems necessarily involve the consideration of the assessments and compliance orders of the DEQ, the primary state agency concerned with environmental protection and regulation. *See, Matter of American Waste and Pollution Control, Co.*, 93-3163 (La. 9/15/94), 642 So. 2d 1258 and *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 452 So. 2d 1152 (La. 1984). The DEQ's actions in protecting the public interest in the environment are governed by a rule of reasonableness that "requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors." *Save Ourselves*, 452 So. 2d at 1157. As the Second Circuit aptly noted in *Morris & Dick-*

son Co., Inc. v. Jones Brothers Company, Inc., 29,379 (La. App. 2 Cir. 4/11/97), 691 So. 2d 882,

> [t]he DEQ's exercise of its role as the public trustee for the protection of the environment results in the development and imposition of a remediation plan [that] determines in large part the measure of damages for the environmental liability affecting a particular property. Apart from this imposed liability as a broad remedy for the public's protection, the actual damages for the private litigants involved in the controversy might not be the same under the conventional measure of damages.

Id. at 17, 691 So. 2d at 892.

In this case, the trial court charged the jury on restoration damages as follows:

> Generally, when a plaintiff sustains damage to property due to the fault of another, he is entitled to recover damages, either the cost of restoration or the difference between the value of the property before and after the harm. However, if the cost of restoring the property to its original condition exceeds the value of the property damages may be measured by the difference between the value of the property before and after the harm. You may award plaintiffs' [sic] the cost to repair and restore the property if you find that plaintiffs intend to repair or restore it. As a general rule, a plaintiff should be put in as good a position as before his property was damaged, but not a superior position.

This jury charge clearly sets forth the law as enunciated in *Roman Catholic Church*, *supra*, but makes no reference to DEQ rules governing the remediation of land for unrestricted use.

The trial court's jury instruction on restoration damages insofar as it followed *Roman Catholic Church* is a correct statement of the law, and when the jury instructions are

viewed as a whole, we cannot say that the exclusion of the DEQ standard from the jury charge misled the jury or tainted the verdict. Also, the record contains extensive testimony from environmental experts and documentary evidence pertaining to DEQ NORM regulations on land remediation and Exxon has not shown that the jury ignored this evidence due to the absence of the proposed jury charge in making its award.

Next, we must consider whether the jury's award of $56 million in restoration damages is unreasonable or manifestly erroneous in view of the evidence presented at trial.

The Louisiana Supreme Court in the case of *Corbello v. Iowa Production*, 02-0826 (La. 2/25/03), 850 So. 2d 686, considered the issue of whether the trial court erred in rendering judgment on a jury verdict that awarded the plaintiff $33 million for the defendant's failure to restore property to its original condition even though the land would be worth $108,000.00 in the restored condition. In 1961, the plaintiffs by a written contract leased land to the defendant for the purpose of conducting the defendant's oil and gas related activities. The lease in pertinent part stated:

> Lessee agrees to indemnify and hold lessor harmless from any and all loss, damage, injury and liability of every kind and nature that may be caused by its operations or result from the exercise of the rights or privileges herein granted. **Lessee further agrees that upon termination of this lease it will reasonably restore the premises as nearly as possible to their present condition.** [Emphasis supplied.]

The Court noted that the contract did not limit the defendant's liability for reasonable restoration to the market value of the property. *Id.* at p. 7, 850 So. 2d at 694. Included within the $33 million damage award was $28 million for restoration of the Chicot Aquifer even though the trial testimony established only that the aquifer *might* be contami-

nated. *Id.* at pp. 12-14, 850 So. 2d at 697-98. Distinguishing *Roman Catholic Church, supra*, on the basis that it was a tort suit, the Court held that the contract was the law between the parties that did not limit the defendant's liability for damages. *Id.* at p. 8, 850 So. 2d at 694-95. The Court further held that the contractual obligation to reasonably restore the property was not "tethered" to the market value of the property. *Id.* at p. 6, 850 So. 2d at 693. The Court recognized the right of a party to recover the costs of remediation even though the damaged party could not be forced to use the award to do so. *Id.* at pp. 12-21, 850 So. 2d at 697-701. Citing *Federal Insurance Co. v. Insurance Co. of North America*, 262 La. 509, 263 So. 2d 871 (1972), the Court noted that when one has a contractual relationship with another and claims to have been damaged by the conduct arising out of that contractual relationship, two remedies exist: one in contract and another tort; the damaged party may elect to recover his damages in either tort or contract. *Corbello*, p. 32, 850 So. 2d at 708. If the damaged party elects to proceed in contract, he waives his right to seek exemplary damages. *Id.* at p. 31, 850 So. 2d at 707. On rehearing by per curiam, the Court specifically emphasized that a party could only recover for actual harm, not potential harm. *Id.* at p. 1, 850 So. 2d at 715.

As to the evidence presented at trial concerning restoration costs, the plaintiffs' expert, Stanley Waligora, a health physicist certified by the American Board of Health Physics and principal health physicist with Environmental Dimensions, Inc., testified that he had extensive experience working under contract with the United States Government on the remediation of radioactive waste sites. Although he did not actually survey the Grefer property, Mr. Waligora visited the site on several occasions. He estimated that it will cost the plaintiffs between $60 million and $82 million to test, collect, contain, transport, and dispose of the radioactive waste on the surface and subsurface of the 32.75-acre property to

comply with the DEQ and the United States Environmental Protection Agency ("EPA") regulations. According to his estimate, disposal costs alone would be $58,862,684.00. In reaching his conclusion, Mr. Waligora considered the public's safety and the history of the site, i.e., ITCO had cleaned piping/tubulars on the property for many years. He explained that his cleanup procedure used a "segmented gate system" that was designed by the U.S. Departments of Energy and Defense and has been used by the federal government and private industries for remediation of similar sites. The plan called for the removal of the first two feet of topsoil throughout the entire Grefer tract. He chose the average depth of two feet for excavation because radiation has been found in some instances as deep as three feet and in other instances as shallow as one foot. The excavated soil would then be processed on site by a machine that scans the soil on a conveyor belt. The clean soil would be separated from the contaminated. Uncontaminated soil would be re-deposited on the Grefer tract, and the contaminated soil would be disposed of properly. Mr. Waligora acknowledged that his remediation plan was not based solely on the DEQ standard for remediation of NORM contaminated property for unrestricted use and that his estimated cost of remediation greatly exceeded the $1.5 million value of the property in an unrestricted use state. He further explained, however, that a remediation under DEQ standards requires that property be cleaned to a level sufficient to prevent public exposures in excess of 25 millirems per year, yet a soil reading of 5 pCi/g above background may still emit dangerous levels of radiation in excess of 200 millirems per year. Mr. Waligora testified that the standard of no more than 1 pCi/g above background meets DEQ, Nuclear Regulatory Commission ("NRC") and EPA dose standards and is reasonably achievable and protective of the public health.

Exxon's expert, Mr. Mark Krohn, a certified radiation protection technologist with American Radiation Service

("ARS"), testified that he performed a gamma exposure rate screening survey of the Grefer tract in June 2000 and identified five areas of the property with gamma exposure rates equal to or greater than twice background levels. He returned in August 2000 to conduct a detailed 100% gamma exposure rate survey and sampling evolution to a depth of 12 inches on those five areas and found one area that contained a sealed radium-226 source. Once the sealed source was removed gamma exposure rates returned to normal background levels. In February and March 2001, ARS conducted two separate 100% gamma exposure rate surface scans of areas of the tract that were not surveyed earlier. At that time, ARS also did a detailed sub-surface survey and sampling evolution on the entire Grefer tract to confirm the absence or presence of sub-surface NORM. Mr. Krohn testified that the ARS survey indicated five small areas measuring a total of 11,518 square feet or 0.8 percent (0.8%) of the Grefer tract contained radium-226 activity levels greater than 5 pCi/gm above background, and under DEQ NORM regulations these were the only areas on the property that required remediation. Based on the ARS survey results, he opined that 99.2 percent of the property may be put to unrestricted use. Mr. Krohn emphasized that to bring the Grefer tract into compliance with DEQ regulations entailed removing the top six inches of soil. He estimated that remediation and disposal costs to release the Grefer property to unrestricted use in accordance with DEQ regulations was approximately $46,000.00. On cross-examination, Mr. Krohn acknowledged that for remediation purposes DEQ standards require the property be cleaned to prevent public exposures in excess of 25 millirems per year of radiation yet conceded that he had not done any calculations to determine the amount of radiation emitted from a soil reading of 5pCi/g above background.

The record also reflects that in the early stages of the litigation, the plaintiffs had retained the professional services of

Mr. Edwin M. Cargill, a health physicist from Radiation Protection Resources, and had listed him as an expert witness for trial. At the request of plaintiffs' counsel, Mr. Cargill surveyed the Grefer property to determine the amount, if any, and location of radioactive material on the premises. In conjunction with his survey, Mr. Cargill prepared a preliminary report dated November 13, 1999, that indicated the presence of TERM on several areas of the property and estimated that the cost to remediate and restore the property for unrestricted use at $1,387,310.00. However, Mr. Cargill noted in the preliminary report that the survey results and estimated costs could change "because of the possibility that buried waste was not detected and also due to the heavily wooded state of the property, making [the] survey difficult."

The plaintiffs neither called Mr. Cargill to testify at trial nor introduced into evidence his survey and preliminary report. Exxon, however, did admit the survey results and preliminary report into evidence during the direct examination of Mr. Krohn to demonstrate that Mr. Waligora's estimate between $60 million and $80 million was clearly unreasonable. Mr. Krohn testified that although he disagreed with Mr. Cargill's remediation estimate, he did consider his survey and report in conducting the ARS survey. In contrast, Mr. Waligora, acknowledged that he had worked closely with Mr. Cargill on several remediation projects and in other litigation and that he respected his opinion, but he thought Mr. Cargill's survey results were not accurate and his remediation estimate too low because they failed to consider the full extent of the subsurface contamination on the Grefer tract.

Unlike *Corbello*, the Grefers and ITCO had a contract between them that did not require the land to be restored to its original state at the end of the contract. Further, the Grefers elected to proceed per *Federal Ins. Co. v. Insurance Co. of North America*, *supra*, in tort, not contract, and to exercise

their right to seek exemplary damages under the now former La. C.C. art. 2315.3. Thus, *Roman Catholic Church* governs that which the Grefers may recover from Exxon and ITCO.

In determining damages, the trier of fact is accorded much discretion. La. C.C. art. 2324.1. On appeal, consideration of the jury's determination of damages is limited to a review for manifest error or abuse of discretion. *Wingfield, supra*, 2001-2668 at p. 27, 835 So. 2d at 806. In determining the amount of damages, the discretion vested in the trier of fact is "great." *Youn v. Maritime Overseas Corp.*, 623 So. 2d 1257, 1261 (La. 1993), *cert. denied, Maritime Overseas Corp. v. Youn*, 510 U.S. 1114, 114 S. Ct. 1059, 127 L. Ed. 2d 379 (1994). Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. *Rosell v. ESCO, supra* at 844. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *Id.*

In this particular case, the jury's award of $56 million for restoration damages for a tract of land whose highest market value is $1.5 million certainly appears unreasonable. Nonetheless, the Supreme Court in *Corbello* affirmed an award for millions of dollars of damages for a water aquifer where no evidence was presented that the aquifer beneath the Corbello property was in fact damaged by contamination from the defendant's operations and it was questionable as to the right of Corbello to recover those alleged damages. When we compare that to the language in *Roman Catholic Church* that requires the award of **reasonable** damages in a tort case, which rarely may exceed the fair market value of the property, we cannot conclude that the $56 million award in this case is unreasonable.

The jury was presented with evidence from experts estimating the cost to remediate the Grefer property ranged from $46,000.00 to $82 million dollars, with $1,387,310.00 being the closest estimate to the market value of the property. Although Mr. Waligora's estimate of $60 million to $82 million was based not on DEQ's standard for remediation of NORM contaminated property for unrestricted use, but rather on more stringent guidelines set by the EPA and Nuclear Regulatory Commission ("NRC"), the evidence reflects DEQ's regulations were considered in his remediation plan. Still, the jury's restoration award was $4 million less than Mr. Waligora's lowest estimate.

We also emphasize Judge Grefer's testimony that he and his siblings want to restore the property, which has been in the Grefer family since 1875, to its original condition and not to the mere minimum DEQ standard. He explained that they are unable to sell or lease the contaminated property without exposing themselves to liability and they do not want to burden their children with this. Judge Grefer also expressed grave concern about the effects the radioactive contamination might have on the neighbors and the general public. Clearly, the plaintiffs had both personal and economic reasons for wanting to restore their property to its original condition. Pursuant to the rule set forth in *Roman Catholic Church, supra*, they may elect to do so. After a review of the record, we cannot say the jurors abused their discretion or manifestly erred in making the $56 million award. Thus, we will not disturb the jury award on restoration damages.

Applicability of Louisiana Civil Code Article 2315.3

In this assignment of error, Exxon asserts that the jury's award of exemplary damages must be vacated because the plaintiffs' cause of action accrued before La. C.C. art. 2315.3 was enacted. Specifically, Exxon contends that the plaintiffs' cause of action accrued when their property first sustained the "slightest" damage, i.e., sometime in the 1960s

when ITCO began cleaning NORM scale from Exxon's used oilfield equipment on Grefer property. Because the plaintiffs' cause of action accrued before 1984, and article 2315.3 cannot be applied retroactively under *Anderson v. Avondale Industries, Inc.*, 2000-2799, p. 3 (La. 10/16/01), 798 So. 2d 93, 97, Exxon asserts the plaintiffs are precluded from recovering exemplary damages.

Former La. Civil Code article 2315.3 was enacted in 1984 and later was repealed by La. Acts 1996, 1st Ex. Sess., No. 2, § 1, effective April 16, 1996. The former article provided, in pertinent part:

> In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances.

In support of its argument that article 2315.3 is inapplicable because the plaintiffs' cause of action accrued prior to its enactment, Exxon relies on the cases of *Champagne v. Celotex*, 599 So. 2d 1086 (La. 1992) and *Bulot v. Intracoastal Tubulars Services, Inc.*, 98-2105, p. 1 (La. App. 4 Cir. 2/24/99), 730 So. 2d 1012. In *Champagne*, the Supreme Court considered whether to apply pre-comparative fault law to tort claims filed by employees injured by long-term asbestos exposure. Finding that all of the employees were injured by long-term asbestos exposure before the 1979 comparative fault law was enacted, the Court held that the pre-comparative fault mechanism for allocating liability applied even though the employees alleged that some exposure occurred *after* the comparative fault law went into effect. *Id.* at 1088.

In *Bulot v. Intracoastal Tubulars Services, Inc.*, 98-2105, pp. 4-8 (La. App. 4 Cir. 2/24/99), 730 So. 2d 1012, 1015-16, a personal injury case also involving the Grefer property and ITCO's operations, several former ITCO employees and the

survivors of deceased employees filed suit against Exxon and others for injuries caused by occupational exposure to TERM scale and other toxic materials. The issue before us was whether the plaintiffs could recover exemplary damages if they or the decedents worked for ITCO prior to the enactment of La. C.C. art. 2315.3 in 1984. We held that the La. C.C. art. 2315.3 did not apply to claims filed by the living employees, or to the survival claims filed by the survivors of the deceased employees, but that it did apply to the wrongful death claims of the survivors of those former employees who died while La. C.C. art. 2315.3 was in effect.

On remand from the Supreme Court in *Bulot v. Intracoastal Tubulars Services, Inc.*, 98-2105, p. 1 (La. App. 4 Cir. 5/17/00), 761 So. 2d 799, we had to reconsider our decision in view of the Supreme Court's recent holding in *Walls v. American Optical Corp.*, 98-0455 (La. 9/8/99), 740 So. 2d 1262.[25] We again concluded that the application of La. C.C. art. 2315.3 to survival actions is triggered by the date of exposure, citing *Cole v. Celotex Corp.*, 599 So. 2d 1058 (La. 1992). As to the wrongful death claims, based on the Court's holding in *Walls*, we concluded that La. C.C. art. 2315.3 was applicable because the cause of action arose after the effective date of the amendment, noting that the law in effect at the time of death is the law that applies to a wrongful death action. Thus, the plaintiffs could seek exemplary

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[25] In *Walls*, the Supreme Court addressed the issue of whether the Workers' Compensation Act, specifically La. R.S. 23:1032 as amended in 1976, which extends tort immunity to executive officers, barred a wrongful death action against the executive officers when the decedent's occupational exposures occurred entirely before the statute was amended, but the death from silicosis did not occur until years after the amendment's effective date. The Court held that applying the 1976 amendment to silicosis exposure that predated the statute, resulting in death after the effective date of the statute, did not result in an impermissible retroactive application of the law.

damages in their wrongful death claims even though the decedents' exposure occurred prior to the enactment of article 2315.3 in 1984. *Bulot*, 98-2105 at p. 2, 761 So. 2d at 800-01.

Thereafter, the *Supreme Court in Bulot v. Intracoastal Tubular Services, Inc.*, 2000-2161 (La. 11/13/00), 773 So. 2d 152, granted a writ intending to address whether the application of La.C.C. art. 2315.3 to conduct arising prior to its effective date would be an improper retroactive application of the article under *Walls*. However, in reviewing the record, the Court determined that the plaintiffs had alleged each of the decedents had some exposure to hazardous substances after the effective date of La. C.C. art. 2315.3. Because the case was before the Court on an exception of no cause of action and the plaintiffs pled a cause of action for punitive damages arising from post-1984 conduct, the Court recalled the writ, stating that, "we express no opinion as to whether plaintiffs could recover punitive damages for pre-1984 conduct." *Bulot v. Intracoastal Tubular Services, Inc.*, 2000-2161, p. 2 (La. 2/9/01), 778 So. 2d 583, 584 n.4.

Thus, for the purpose of determining when La. C.C. art. 2315.3 applies, the relevant time period is the time the injury occurs. In *Quick v. Murphy Oil Co.*, 446 So. 2d 775, 780 (La. App. 4th Cir.1984), we stated:

> We do distinguish, however, the time when a cause of action arises from when prescription begins to run. A cause of action arises when injury occurs, while prescription begins to run only when the injured party becomes aware of his injury.

Unlike *Champagne* and *Bulot*, which involved latent disease injuries, the contamination to the plaintiffs' land occurred as the result of Exxon's conduct over a period of several years. Indeed, the build up of NORM scale deposits on the surface and subsurface of the Grefer property occurred gradually during years of cleaning pipe on the premises. It is

well settled that when a tort involves continuing injury, the cause of action accrues at the time the tortious conduct ceases. *In re Med. Rev. Panel of Moses*, 2000-2643, p. 16 (La. 5/25/01), 788 So. 2d 1173, 1183. Since no single incident in the continuous chain of tortious activity can be identified as the cause of significant harm, courts have held it proper to regard the cumulative effect of the conduct as actionable. *Id.* at p. 20, 788 So. 2d at 1185.

The evidence in the record indicates that radioactive scale was discharged from the used oilfield pipes from the 1960s through 1992 when ITCO terminated its lease. The discharged scale was dumped, buried, and utilized throughout the yard as road fill and surface material. In time, radioactive contamination resulting from the NORM scale deposits was found in varying degrees throughout the Grefer tract. The record also indicates that in March 1987, ITCO first learned that Exxon's used oilfield piping/tubulars contained NORM, and it no longer cleaned NORM contaminated pipes after that date. If we were to accept Exxon's argument that the plaintiffs' cause of action accrued when ITCO began cleaning Exxon's NORM contaminated oilfield pipe in the 1960s, we would effectively excuse any punitive conduct that occurred after the enactment of La. C.C. art. 2315.3, provided it was a continuation of pre-enactment misconduct. We do not believe this was the intent of the Louisiana legislature in enacting the statute. Thus, for purposes of determining the applicability of La. C.C. art. 2315.3, we find the plaintiffs' cause of action accrued in March 1987, when ITCO stopped cleaning Exxon's NORM contaminated pipe on the Grefer land. After that date, any piping/tubulars with NORM levels reading 5pCi/g or higher above background were segregated to that portion of ITCO's property leased to Exxon.

Conduct Under Louisiana Civil Code Article 2315.3

In its fifth assignment of error, Exxon argues that the jury's award of exemplary damages must be vacated because the record does not support a finding that Exxon engaged in wanton or reckless conduct. Exxon contends the La. C.C. art. 2315.3 required the plaintiffs to prove that it sent NORM-contaminated oilfield tubing to ITCO for cleaning even though it knew public safety was at risk, or that it should have known that it was "highly probable" that its conduct would harm the public. In other words, Exxon's state of mind had to be one of "conscious indifference to the consequences, amounting almost to a willingness that harm should follow." *Griffin v. Tenneco Oil Co.*, 531 So. 2d 498, 501 (La. App. 4th Cir. 1988). Exxon further argues that no reasonable juror could have concluded that Exxon acted with the quasi-criminal intent article 2315.3 required. *See Oubre v. Union Carbide Corp.*, 99-0063, p. 22 (La. App. 5th Cir. 12/15/99), 747 So. 2d 212, 227.

In contrast, the plaintiffs argue that they presented sufficient evidence at trial to allow a reasonable person to conclude: (1) that Exxon acquired specific knowledge of the dangers of the radioactive waste in its oil production and specific knowledge of the procedures to protect against those dangers in 1985; (2) that Exxon never adequately warned ITCO of the danger; (3) that Exxon withheld information from the Grefers; (4) that Exxon failed to take any steps to prevent further contamination until 1987; and (5) that Exxon's preventative measures were inadequate.

The statute providing for exemplary damages for wanton and reckless disregard for public safety in storage, handling or transportation of hazardous or toxic substances must be strictly construed, as it imposes a penalty. *Bonnette v. Conoco, Inc.*, 2001-2767, p. 27 (La. 1/28/03), 837 So. 2d 1219, 1236-37. To obtain an award of exemplary or punitive damages under La. C.C. art. 2315.3, the plaintiff must prove:

(1) that the defendant's conduct was wanton and reckless by proving that "the defendant proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position," or that the defendant engaged in "highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent;" (2) that the danger created by the defendant's wanton or reckless conduct threatened or endangered public safety; (3) that the defendant's wanton or reckless conduct occurred in the storage, handling or transportation of hazardous or toxic substances; and (4) that the plaintiff's injury was caused by the defendant's wanton or reckless conduct. *Id.*; *Billiot v. B.P. Oil Co.*, 93-1118, pp. 16-17 (La. 9/29/94), 645 So. 2d 604, 613.

Our review of the record discloses sufficient evidence to support the jury's finding that Exxon engaged in wanton and reckless conduct. Exxon first learned of NORM contamination in oilfield drilling equipment in 1981, when Occidental Petroleum discovered it on its platforms in the North Sea. At that time, Dr. Andrew Lloyd Smith, a Scottish environmental consultant, was working for Occidental Petroleum in the U.K., and following the discovery, was a member of the United Kingdom Offshore Operators Association (UKOOA) Safety Committee that drafted and published the UKOOA safety guidelines and Reference Manual that were given to all oil companies operating in the North Sea. ITCO offered Dr. Smith as a health and safety expert witness at trial. According to Dr. Smith, the reference manual was extensive and covered both the identification of radioactive scale and the procedure to follow up on such identification. The guidelines, promulgated by the oil and gas industry and approved by the National Radiological Protection Board ("NRPB"), recommended the specific steps to minimize or eliminate the effect of NORM on public health and the environment. Dr. Smith conceded that the UKOOA reference manual was devoted exclusively to NORM scale accumulating in the North

Sea and, for all the industry knew, the NORM phenomena was peculiar to oil production in that area.

Though Exxon was abreast of the problem, it took no action to survey its wells elsewhere. The depositions of Mr. John Rullman, Director of Exxon's Eastern Division Environmental and Regulatory Affairs, and that of Mr. Everett C. Hutchinson, Exxon's Assistant Director of Environmental and Regulatory Affairs, were introduced into evidence and read to the jury at trial. Mr. Rullman testified that he had obtained a copy of the UKOOA safety guidelines and found they were very onerous, restrictive, and inflexible. He also admitted that he was not sure if at that time Exxon had the same problem in the U.S. Mr. Hutchinson, too, believed the UKOOA guidelines were unreasonable for Exxon's production operations in the U.S. Mr. Booher, Exxon's industrial hygienist, admitted that if Exxon had surveyed its wells prior to the Chevron discovery in the U.S. in 1986, then it would have discovered radium in its wellheads much sooner.

In May 1986, after learning of Chevron's NORM discovery in Mississippi, Exxon surveyed its Mississippi well sites and found radiation accumulation in its equipment. Twice Exxon officials were notified that the cleaning contractors had to be informed of the radioactivity, as it posed a health and safety hazard, but they still did nothing to warn them.

The evidence further reflects that by August 1986 Exxon was clearly worried about governmental regulation and losing the produced water exemption, which allowed it to dispose of the by-product in an unregulated manner. A memo written on August 28, 1986, by Mr. Howard Collier, Exxon's director of Environmental and Regulatory Affairs, stated, "Chevron has taken a very high profile approach to handling their discovery of radiation in Mississippi and many agencies are now involved." Mr. Collier expressed an interest in "[getting] the industry and the regulatory agencies to slow down." Then he admitted,

> Chevron's discovery is nothing new. After all, if there wasn't some radiation in down-hole formations, it would be difficult to run a gamma ray log. My primary concern is the current investigation and analysis not unduly influence the EPA who is in the process of deciding under RCRA [Resource Conservation Recovery Act] whether produced water should be classified as a hazardous waste and handled as such.

Mr. Booher's notes taken from comments made by Mr. Collier at an Exxon NORM meeting in Houston on January 8, 1987, indicate the cost of losing the RCRA exemption for produced water as $750 million in the first year and $150 million for each year thereafter. At that same meeting, several Exxon officials concluded that notifying the cleaning contractors would be "premature."

Exxon was also concerned about litigation arising from the NORM discovery in Mississippi. Street, Inc., a pipe yard company in Mississippi, had filed suit against Chevron and other oil companies (not Exxon), for $35 million, claiming negligence for failure to advise that pipe delivered to it was contaminated with radioactive material. Mr. Hutchinson, in an internal memo copied to Mr. Rullman, recognized the possible "need to manage the disposal of large accumulations of contaminated scale, such as could occur at a pipe yard." Mr. Rullman, in a confidential memo dated October 14, 1986, noted ITCO was a potential "look alike" to Street, Inc., and stated, "If potential exists for radioactive material accumulation, perform low key radiation exposure measurements;" "Coordinate ITCO plan with Eastern Division;" and "Consider advisory letter to ITCO with Headquarters involvement." Still, Exxon did nothing to notify ITCO.

Eventually, Exxon sent the letter notifying the cleaning contractors of the NORM problem in March 1987, ten months after it had identified the problem at its domestic well sites. Even then Exxon downplayed the hazard, as evi-

denced by Exxon's meeting with ITCO. According to Mr. John Hooper, Exxon's videotape made the health risks associated with NORM scale sound minor and the safety procedure guidelines merely suggested taking precautions to avoid breathing or ingesting airborne dust.

Exxon maintains that no reasonable juror could have concluded that it knew about the NORM buildup in domestic oil production tubing before 1986. We disagree. Although the 1981 discovery of NORM inside drilling equipment was limited to the North Sea area, by that time Exxon knew that Shell Oil had found radioactive material in equipment at a refinery in the U.K. The knowledge that radioactive material had been found in both drilling and refining equipment in that region of the world coupled with the fact that just a few years earlier Exxon discovered radioactive deposits inside equipment at several Texas gas plants, and concluded the source was radon-222 entering the plants with the natural gas stream coming from the wellhead, the jury could have concluded that Exxon knew or should have known of the likelihood of NORM contamination in domestic oilfield production equipment before Chevron's Mississippi discovery in 1986. Considering the integrated nature of Exxon's operations, such a conclusion is reasonable. Also, in view of Mr. Collier's August 28, 1986 memo, stating, "Chevron's discovery is nothing new," the jury reasonably could have concluded that Exxon knew about the NORM deposits in its domestic oilfield equipment before 1986, and its failure to act sooner was wanton and reckless.

Exxon contends, too, that it acted to protect the public safety after Chevron's 1986 NORM discovery. Exxon emphasizes that after the discovery it conducted a nationwide NORM survey of all its facilities; it began screening used tubing for NORM at production sites and the contaminated tubing was stored – not cleaned; it began to screen tubing at central storage facilities like ITCO; it recommended safety

procedures; and it began to develop a new cleaning process that would allow for the previously-stockpiled, NORM contaminated tubulars to be cleaned safely.

We find no merit to Exxon's argument. Clearly, the evidence reflects that the action taken by Exxon after the Chevron discovery was to benefit Exxon, not the general public. As a result of the discovery, Exxon was faced with unprecedented environmental, legal, economic, and financial challenges. It had no choice but to act. In any event, we find Exxon's most egregious act was failing to notify ITCO of the NORM hazard immediately after it tested the Exxon Mississippi wells and discovered NORM at the well sites. Although Exxon's representatives claimed that to notify the cleaning contractors immediately would have been "premature" until they knew the extent of the problem and they did not want to "alarm" the public, their failure to do so is inexcusable. Exxon executives had been warned that NORM posed a human safety hazard to anyone exposed to it, but they waited nine months to send the warning letter to the contractors and to meet with ITCO. Exxon's delay in notifying ITCO of the danger was wanton and reckless. After all, the ITCO employees were the persons handling the NORM contaminated piping/tubulars on a daily basis and were most at risk, not Exxon's executives.

Upholding the jury's finding that punitive damages are warranted in this case, we turn now to consider whether the jury's one billion dollar award is constitutional.

Constitutionality of Punitive Damage Award

In this assignment of error, Exxon asserts that the $1 billion punitive damage award is unconstitutional as it violates Exxon's Fourteenth Amendment right to due process of law.

In recent years, the U.S. Supreme Court has considered several cases raising exemplary damage issues. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589,

134 L. Ed. 2d 809 (1996), the Court ruled that exemplary damage awards that are "grossly excessive" violate the Due Process Clause of the Fourteenth Amendment. The Court then provided three "guideposts" for gauging when an exemplary damage award crosses the constitutional line: (1) the reprehensibility of the defendant's conduct; (2) the ratio between the exemplary damage award and the harm the defendant's conduct caused, or could have caused; and (3) the size of any civil or criminal penalties that could be imposed for comparable misconduct.

The constitutional constraints on the amount of exemplary awards were again considered in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001), wherein the Court ruled that state and federal appellate courts must conduct a *de novo* review of exemplary damage awards challenged as being grossly excessive under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Cooper*, 532 U.S. at 433-434, 121 S. Ct. at 1685-1686. In mandating a *de novo* review, the Court reasoned that "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." *Id.* at 437, 121 S. Ct. at 1686.

More recently, in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) the Court further tightened the permissible limits of exemplary awards, holding that appellate "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.*, 538 U.S. at 426, 123 S. Ct. at 1524.

Keeping in mind the principles outlined in *BMW of North America, Inc., v. Gore*, the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v.*

Campbell, our *de novo* review of the jury's exemplary damage award follows.

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, *supra*, at 575, 116 S. Ct. 1589. In determining the reprehensibility of a defendant, courts are instructed to consider whether: the harm caused was physical as opposed to economic; the tortuous conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. 517 U.S. at 576-577, 116 S. Ct. 1589. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should be awarded only if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.* at 575, 116 S. Ct. at 1589.

In this case, it is undisputed that the plaintiffs suffered strictly economic harm, i.e., property damage. While Exxon's conduct resulted in no physical harm to them, it certainly evinced an indifference to or reckless disregard of the health and safety of others. As stated above, Exxon's nine-month delay in notifying ITCO and the other cleaning contractors of the dangers posed from handling NORM contaminated equipment certainly put their employees at risk. Even though ITCO no longer cleaned NORM contaminated piping/tubulars after March 1987, Exxon was well aware that NORM contaminated equipment remained stockpiled on

ITCO's property. This posed a health hazard to those on the premises.

We also find that the target of the conduct was financially vulnerable. ITCO had leased the property from the Grefer family for many years and during that period operated a very successful business cleaning oilfield equipment. After Exxon discovered the NORM contamination in its drilling equipment and finally realized the extent of the problem, the oil company sought to wipe its hands clean and leave ITCO with the mess. Notably, on April 19, 1989, Mr. Rullman sent a memo to Mr. Roger Koerner, Exxon's top manager for the Eastern Division, regarding "ITCO Contract Recommendations." The memo stated in part:

> RAE [Exxon's Regulatory Affairs Engineering] concurs with the suggestion to screen other contractors to ascertain their abilities to decontaminate NORM material, . . . The development of alternative cleaning/disposal options would help soften their stance [on contract negotiations] and may be needed anyway if the ITCO procedure does not provide sufficient cleaning. The continued use of the ITCO yard could complicate any potential personal injury liability claims since it would be difficult to determine when the exposure occurred that caused the injury. Resuming cleaning with a new contractor would clearly establish the earliest date of potential exposure, and Exxon could better contractually minimize its exposure with the new contractor. This would not, however, help Exxon with any claims from past activities at ITCO.

Shortly thereafter, ITCO's business steadily declined while Exxon sent its used oilfield equipment to new cleaning contractors. After ITCO ceased operations, terminated its lease and vacated the premises, Exxon's NORM scale remained on the premises. In addition to ITCO's failure, the Grefers are now financially burdened with the task of remediating the property.

Furthermore, we find Exxon's repeated conduct from 1985 through 1992, when ITCO finally shut down, did involve an element of deceit. Again, as mentioned above, from June 1986 to March 1987 Exxon officials intentionally withheld information regarding NORM contamination in the piping/tubulars even though they knew the scale posed a direct danger to the physical health and safety of those workers who continued to handle the NORM contaminated equipment on a daily basis. Also, after learning of the danger posed by the NORM contaminated scale, Exxon took no step to remove the radioactive material from ITCO's premises. In our opinion, Exxon's conduct was reprehensible.

Next we consider the second Gore guideline, the disparity between actual or potential harm suffered by the plaintiff and the punitive damage award. For potential harm properly to enter into the ratio, it must be directly attributable to the misconduct and not to lawful or unrelated causes. *See Cooper Industries*, 532 U.S. at 441, 121 S. Ct. at 1688.

In *Campbell*, the Utah Supreme Court justified a punitive award of $145 million in a case in which the plaintiff was awarded $1 million in compensatory damages for State Farm's bad-faith failure to settle, fraud, and intentional infliction of emotional distress. On appeal, the U.S. Supreme Court considered the award under the *Gore* guideposts and concluded that the award was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. *Campbell*, 538 U.S. at 429, 123 S. Ct. at 1526. While the Court declined to impose a bright-line ratio which punitive damages cannot exceed, it noted that its jurisprudence and the principles set forth therein demonstrate that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. The Court recognized that although "there are no rigid benchmarks," a higher ratio could be justified only if "a particu-

larly egregious act has resulted in only a small amount of economic damages." *Id.*, 538 U.S. at 425, 123 S. Ct. at 1524. The Court also noted that the converse is true, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* The Court found the compensatory award of $1 million was "substantial," and concluded that the *Gore* guideposts "would [only] justify a punitive damages award at or near the amount of compensatory damages." *Id.*, 538 U.S. at 429, 123 S. Ct. at 1526. The Court also rejected the Utah Supreme Court's reference to State Farm's enormous wealth to justify the award, stating, "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id.*, 538 U.S. at 427, 123 S. Ct. at 1525.

This case leaves little doubt that there is a presumption against an award that has an 18 to 1 ratio. In our opinion, the compensatory award in this case was substantial; the Grefers were awarded $56,145,000.00 for a piece of property worth at most $1,500,000.00. Although the plaintiffs claimed only property damage, and no physical harm, the trial court allowed the plaintiffs to argue and present substantial evidence, over Exxon's objections, of the potential and/or alleged actual harm to other persons who were not parties to this suit and whose claims were not before the jury. For example, in their opening statement, the plaintiffs' counsel referred to the "community" and "churches immediately next to" the Grefer property. He described radium particles in "a very, very, very fine powder" being blown "all over the place." A video was shown to the jury that depicted elementary school children getting on and off a bus. Witnesses were then asked questions designed to foment the fear of a radium dust cloud blowing over houses, churches, and schools near the Grefer property. The trial court also allowed plaintiffs' counsel to question witnesses about the potential harm of radiation to children and unborn children

even though this case is strictly a claim for damage to immovable property. Likewise, the trial court allowed plaintiff, Rose Grefer Haase, a former nurse, to testify regarding the effects of x-ray radiation and the protections taken by those working with x-ray machines to avoid personal injury. The trial ended with a neighbor, Ms. Thelma Benjamin, testifying on rebuttal about the DEQ and Exxon failing to test her property or the property of others in the neighborhood. Plaintiffs' counsel likened the harm suffered by the Grefers with damages caused in the 1989 EXXON-VALDEZ oil spill. Much of this evidence was irrelevant and, more than likely, confused the jury, contributing to its exorbitant punitive damage award.[26]

The plaintiffs also put on substantial evidence regarding Exxon's wealth. The jury heard that Exxon is the largest corporation in the world and had assets of $251 billion; that its revenue for the year 2000 was $228.439 billion; and that its total net worth in 2000 was $173 billion. In addition, evidence was presented of the salaries, bonuses, stock options, etc., of Exxon's corporate executives. The jury heard that the only way to punish a big corporation like Exxon for its reprehensible behavior was to hit its bank account. Plaintiffs' counsel stated that Exxon could satisfy a large punitive judgment in very little time with the interest that accrues on its $72 billion in shareholders' equity and that it likely would never feel the effect of the judgment because it would be passed on to the consumers at the gas pumps. Counsel also pointed out that Exxon recently had been cast in judgment for several other large punitive damage awards, including a case in which an Alabama jury awarded the plaintiffs puni-

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[26] The record reflects that during jury deliberations, the foreperson sent a note to the trial court inquiring as to whether any of the punitive damage award would go to compensate the people in the community. After discussions with counsel, the trial court instructed the jury that the entire punitive award would go only to the Grefers.

tive damages of $3.4 billion and compensatory damages of $87 million. Such assertions bore no relationship to the harm suffered by the plaintiffs. Although the jury could consider Exxon's wealth, the company's wealth could not provide an open-ended basis for inflating the punitive award. With this in mind, we find the $1 billion dollar punitive damage award is neither reasonable nor proportionate to the amount of harm to the plaintiffs and to the general damages recovered. Considering the substantial compensatory damages awarded in this case, in our opinion a lesser single-digit ratio would be appropriate.

The third guidepost in *Gore* is the disparity between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. The Court in Campbell noted that criminal penalties may also be considered, as the existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. *Campbell*, 538 U.S. at 428, 123 S. Ct. at 1526. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. *Id.* Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, its higher standard of proof. *Id.* Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically justify a punitive award. *Id.*

Exxon argues that it did not violate any state laws or regulations because the DEQ did not establish NORM regulations until 1989[27] and therefore the punitive damage award

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[27] The DEQ first established NORM regulations by emergency rule in February 1989, by amending the Louisiana Radiation Regulations to add Chapter 14, titled "Regulation and Licensing of Naturally Occurring Radioactive Material (NORM)." See La. Reg. 71-72 (2/20/89); LAC 33:XV.1401. *et seq.* Those regulations apply to soil contaminated with

is not warranted. It also argues that the maximum civil penalty under Louisiana law for willful conduct would not exceed $1,000,000.00, and thus if punitive damages are imposed, the amount should not exceed $1,000,000.00.

In the case of *In re New Orleans Train Car Leakage Fire Litigation*, 2000-0479, p. 1 (La. App. 4 Cir 6/27/01), 795 So. 2d 364 (hereinafter "CSX"), we affirmed the trial court's reduction of a jury's punitive damage award from $2.5 billion to $850 million. That case involved personal injury claims by 8,047 class members for injuries arising out of a burning train car carrying a hazardous substance. In reaching our result, we recognized the large number of claimants, their personal injury, the potential that many city blocks could have been destroyed by an explosion, and the evacuation of thousands during the night because of the danger posed by burning chemicals. Like Exxon, the defendant argued in *CSX* that because the maximum civil penalty under Louisiana law for its violation was slightly more than $1,000,000.00 that should have been the amount of the jury's punitive award. We disagreed, noting that "the *BMW* Court did not select and use the term 'guideposts' without reason", and that term does not "connote or suggest a cumulative series of three 'tests' or 'elements' which must be met." *CSX*, at p. 33, 795 So. 2d at 386. We then specifically rejected the notion "that the third guide . . . 'caps' punitive damages." *Id.* at p. 33, 795 So. 2d at 386-87.

The plaintiffs point to various criminal fines for violations of Louisiana statutes and regulations and give examples in which fines of tens of thousands of dollars a day would be imposed every day for the years Exxon was in violation of the law. Notably, in *Cooper*, the Court rejected an effort,

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NORM, as well as waste management, transfer, and disposal with regard to sites and facilities involved in storage and/or cleaning of tubulars and contaminated equipment. LAC:XV.1402.

similar to the plaintiffs' here, to suggest that the maximum fine provided by an Oregon statute would have been imposed each time a piece of promotional literature was distributed, 532 U.S. at 442-43, 121 S. Ct. at 1689, while in Campbell the Court rejected an attempt to justify a large award based on speculation about whether, in a criminal prosecution, the defendant might have lost its business, license, been imprisoned, or been required to disgorge all profits.

The fact that Louisiana had no regulations governing NORM until 1989 does not excuse Exxon's reprehensible action. And Louisiana's maximum civil penalty for willful misconduct, alone, cannot limit a punitive damage award. Nonetheless, based on our review of the record, we find that $1 billion punitive award in this case is exorbitant and must be reduced.

In summary, we find that an application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded, likely would justify a punitive damages award closer to the amount of compensatory damages. The punitive damage award of $1 billion, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of Exxon's property. Therefore, we will amend the jury's award to reduce it to an amount that we have determined is both reasonable and proportionate to the amount of harm suffered by the Grefers and to the general damages of $56,145,000.00, which is $112,290,000.00 or twice the general damage award.

Interest on the Punitive Damage Award Judgment

The plaintiffs argue in their sole assignment of error on appeal that the trial court erroneously refused to attach prejudgment interest to the punitive damage award. We disagree.

In *CSX, supra*, we held that judicial interest may begin running on a punitive damage award no earlier than the time a court signs a judgment memorializing that award. *Id.* at pp. 53-54, 795 So. 2d at 397-98. "Under both Louisiana and federal law, a plaintiff is entitled to interest on punitive damages only from [the] date of judgment." *Jordan v. Intercontinental Bulktank Corp.*, 621 So. 2d 1141, 1158 (La. App. 1st Cir. 1993).

ITCO's Fault

In this assignment of error, ITCO argues that the jury erred in finding it five percent (5%) at fault.

Prior to the close of trial, the parties and the trial court agreed that there would be only one jury interrogatory pertaining to ITCO's liability under different theories of recovery and the trial court so instructed the jury. In effect, ITCO stipulated that a finding of "fault" could encompass liability for negligence, nuisance, strict liability, and breach of the lease agreement. ITCO specifically stipulated that a finding of fault against ITCO would be a prima facie "finding of a breach of lease for purposes of the record and the judgment and the appeal."

The jury's finding of 5% fault against ITCO is entitled to substantial deference on appeal and must be affirmed unless we find the jury was manifestly erroneous. *See Stobart v. State, Through DOTD*, 617 So. 2d 880, 882 (La. 1993). The issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was reasonable. *Id.*

After reviewing the record, we find the jury reasonably could have found ITCO at fault for breaching its lease with the Grefers. Paragraph 14[28] of the leases provide:

[28] This provision appears as paragraph 15 in two of the leases.

> Lessee shall maintain in good order and condition any buildings or other improvements it may erect on the leased premises, as well as the ground surrounding the same, and said property shall never be so used as to create nuisance.

The evidence in the record reflects that ITCO had erected at least one pipe-cleaning machine, as well as numerous roads and pipe racks, on the Grefer property. ITCO claims it did not breach the lease because it never erected any buildings on the Grefer property. Though an "improvement" is not defined in the ITCO/Grefer lease, the pipe-cleaning machine, pipe racks, and roads fall within the definition given in Black's Law Dictionary. An improvement is an "addition to real property, whether permanent or not . . . that increases its value or utility." BLACK'S LAW DICTIONARY 761 (7th ed.1999). The photographs introduced into evidence depict that the pipe-cleaning machines, pipe racks, and roads are improvements. Furthermore, Mr. Hooper acknowledged that ITCO found NORM contamination in the area of the pipe racks and the cleaning machines. Testimony also reflects that ITCO used the discarded contamination scale to build roads on the property. In view of the evidence and the number of years ITCO occupied the Grefer property, we cannot say the jury erred in allocating some fault to ITCO.[29]

INDEMNITY

Exxon argues in its final assignment of error that the jury erred in finding that it must indemnify ITCO. Exxon contends that the contracts between ITCO and Exxon do not contain a contractual indemnity clause in favor of ITCO and that tort indemnity is not available since ITCO was allocated a share of the fault.

---

[29] Considering our conclusion that ITCO breached its contract with the Grefers, we need not address whether ITCO's fault is based on any other theory of recovery.

The record reflects that the jury answered affirmatively to interrogatory number 11, which read, "If you answered yes to numbers 3 and 4 and assigned a percentage to ITCO in number 7, do you find that ITCO is entitled to recover from Exxon all amounts awarded against ITCO under its counterclaim against Exxon?"

Exxon is correct that ITCO has no claim for contractual indemnity and that if this were a tort indemnity case then La. C.C. art. 1804 and the decision in *Diggs v. Hood*, 772 F.2d 190 (5th Cir. 1985) would preclude the claim of indemnity because ITCO was found partially at fault. However, even though ITCO asserted a claim against Exxon for indemnity and/or contribution, the record reflects that ITCO's counterclaim was for a breach of duty to disclose, i.e., breach of contract.

Pursuant to Article 19 of the 1985 ITCO/Exxon contracts, Exxon assumed specific health and safety disclosure obligations. Those obligations were refined in the amendments, dated in October and November 1985, which read in pertinent part:

> Exxon will make available, to Contractor, and it shall be Contractor's responsibility to review, such material safety data sheets as pertain to known toxic and hazardous substances to which Contractor's employees or subcontractors are likely to be exposed while performing any particular or individual work task on behalf of Exxon.
>
> * * *
>
> Exxon's contract representative or his designee and Contractor's appointed safety and health supervisors will meet on a regular basis, preferably at the beginning of each Exxon shift that Contractor is working, to determine whether any changed condition or specific health and safety hazards will be encountered during the work to be

> done during the shift. Additional meetings during each shift will be held if though necessary by Contractor's safety and health supervisor or Exxon's contract representative.

Clearly, these provisions imposed on Exxon a duty to disclose to ITCO any known toxic and hazardous substances to which ITCO's employees or subcontractors were likely to be exposed and to disclose whether any changed condition or specific health and safety hazards would be encountered during the work. In view of our finding that Exxon's conduct was wanton and reckless for failing to notify ITCO in a timely manner of the NORM contamination in its piping/tubulars, we find Exxon did, in fact, breach its duty to warn ITCO and that the jury did not err in finding that, based on ITCO's counterclaim against Exxon, ITCO was entitled to recover from Exxon all amounts awarded against ITCO on the plaintiffs' main demand.

CONCLUSION

Accordingly, for the reasons stated herein, the judgment of the trial court rendered in accord with the jury verdict in favor of the Grefers is amended, in part, to reduce the $1 billion award for punitive damages to $112,290,000.00 to comply with the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In all other respects, the judgment is affirmed. Furthermore, the trial court judgment denying Exxon's exception of prescription is affirmed.

AMENDED AND, AS AMENDED, AFFIRMED

APPENDIX B

TRIAL COURT JUDGMENT

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 97-15004 DIVISION "A"

JOSEPH GREFER, CAMILLE GREFER, ROSE MARIE GREFER HASSI, AND HENRY GREFER

VERSUS

ALPHA TECHNICAL, ET AL.,

JUDGMENT ON JURY VERDICT

This cause having been duly tried before and submitted to the jury and the jury having on May 22, 2002 returned a verdict on special interrogatories at the conclusion of trial, as follows:

1. Do you find that Exxon was at fault?

   Yes X No _____

   If you answered number 1 yes, then go to number 2.

2. Do you find that Exxon's fault caused damage to the Grefer property?

   Yes X No _____

3. Do you find that ITCO was at fault?

   Yes X No _____

   If you answered number 3 yes, then go to number 4.

4. Do you find that ITCO's fault caused damage to the Grefer property?

   Yes X No _____

5. Do you find that any other entity was at fault?

   Yes X No _____

6. If the answer to number 5 is yes, do you find that the fault of any other entity caused damage to the Grefer property?

   Yes X No _____

7. If you answered yes to either numbers 2, 4 or 6, what percentage of responsibility do you find as to the following entities?

Exxon	85 %
ITCO	5 %
Alpha Technical	5 %
OFS Inc.	5 %
Chevron	0 %
Texaco	0 %
Total	100 %

8. Do you find that, if awarded restoration damages, plaintiffs intend to restore their property?

   Yes X No _____

9. What, if anything, do you find to be the cost to restore the plaintiffs' property?

   $ 56,000,000.00 (FIFTY SIX MILLION DOLLARS)

10. What amount do you award to compensate the plaintiffs for their damages, exclusive of restoration costs?

    $ 145,000.00 (ONE HUNDRED AND FORTY FIVE THOUSAND DOLLARS)

11. If you answered yes to numbers 3 and 4 and assigned a percentage to ITCO in number 7, do you find that ITCO is entitled to recover from Exxon all amounts awarded against ITCO under its counterclaim against Exxon?

Yes _X_ No _____

12. Do you find that Exxon is responsible for exemplary damages to the plaintiff?

Yes _X_ No _____

13. If you answered yes to number 12, what amount do you award as exemplary damages?

$ 1,000,000,000.00 (ONE BILLION DOLLARS)

Each and every interrogatory submitted to the jury as aforesaid was answered in the manner indicated by at least nine (9) members thereof, as determined by a poll of jurors. In accordance with the jury's findings, the Court will enter judgement thereon, as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Plaintiffs, JOSEPH GREFER, HENRY GREFER, ROSE MARIE GREFER HAASI, and CAMILLE GREFER, and against Defendants, Exxon Mobil Corporation and Intracoastal Tubular Services, Inc., for all compensatory damages sustained, with legal interest thereon from the date of judicial demand, until paid, and for all costs of these proceedings. The liability of each defendant for compensatory damages shall be joint, several, and in solido.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the fault of each defendant for compensatory damages to plaintiffs are:

1. ExxonMobil: Eighty-five percent (85%) of said judgment; and

2. Intracoastal Tubular Services, Inc.: Five percent (5%) of said judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs are awarded ($56,000,000.00 (FIFTY SIX MILLION DOLLARS) as compensatory damages to restore the property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs are awarded $145,000.00 (ONE HUNDRED FORTY FIVE THOUSAND DOLLARS) as compensatory damages exclusive of restoration costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be a judgment in favor of Plaintiff-in-Cross-Claim, Intracoastal Tubular Services, Inc., against Defendant-in-Cross-Claim, Exxon Mobil Corporation, for all damages awarded to Plaintiffs and cast against Defendant, Intracoastal Tubular Services, Inc.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, in addition to the awards for compensatory damages, there be a judgment in favor of Plaintiffs and against Exxon Mobil Corporation for exemplary damages, in the amount of $1,000,000,000.00 (ONE BILLION DOLLARS), with legal interest thereon from the date of this judgment, until paid, and with costs to be fixed by the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, in accordance with the provisions of LSA-C.C.P. art. 1915 (B)(1), the Court finds that there is no just reason for delay and that, accordingly; this judgment is designated by the Court to be final and appealable.

New Orleans, Louisiana, this 22nd day of June, 2001.

s/ Carolyn N. Gill-Jefferson
JUDGE, CIVIL DISTRICT COURT

A TRUE COPY
s/ (illegible)
DEPUTY CLERK, CIVIL DISTRICT
COURT
PARISH OF ORLEANS
STATE OF LA.

APPENDIX C

LOUISIANA COURT OF APPEAL OPINION DENYING REHEARING

No. 2002-CA-1237
COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

* * * * *

JOSEPH GREFER, CAMILLE GREFER, ROSE MARIE GREFER HASSI AND HENRY GREFER,

VERSUS

ALPHA TECHNICAL, ET AL.

* * * * *

ON APPLICATION FOR REHEARING

* * * * *

Court of Appeal Fourth Circuit

Filed May 16, 2005

s/ (illegible)
Clerk of Court

We clarify our original opinion on two points, but deny the rehearing.

The cases of *Roman Catholic Church of Archdiocese of New Orleans v. Louisiana Gas Service Co.*, 618 So. 2d 874 (La. 1993) and *Corbello v. Iowa Production*, 02-0826 (La. 2/25/03), 850 So. 2d 686, cited in our original opinion, are applicable to show that there is a basis for the awarding of damages that greatly exceed the value of the property regardless of whether the claim is in tort or contract so long as a reasonable basis exists in the record to support the finding. In this case, the jury was presented with several estimates

evidencing the cost to remediate the Grefer tract, including the $46,000.00 figure advanced by Exxon, Mr. Cargill's estimate of $1,387,310.00, which is closest to the actual market value of the property, and Mr. Waligora's estimate of $82,000,000.00. The jury awarded restoration damages of $56,000,000.00, an amount between the two highest estimates. Because there is a reasonable basis in the record to support the jury's finding, we cannot say the jury was clearly wrong in awarding that amount.

With respect to exemplary damages, Exxon argues, citing *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524 (2003), that the conduct that allegedly put ITCO's employees at risk has no place whatsoever in the punitive damages analysis because harm to third parties cannot be punished. This, in our view, is an incorrect and exceedingly narrow reading of *Campbell*. In reviewing an award of punitive/exemplary damages, we have the responsibility of looking to the callous, calculated, despicable and reprehensible conduct of Exxon during the time period in question. Even though this case is not a personal injury claim by the ITCO workers, the mindset of Exxon should be considered in deciding whether the sum awarded was appropriate. The fact that Exxon showed no regard for ITCO's workers, i.e., no concern for human safety, certainly demonstrates that it had even less concern for the property damage that it caused, thus further demonstrating the morally culpable nature of its conduct.

The jury's $1 billion exemplary damage award under any standard, pre-*Campbell* or post-*Campbell*, is manifestly erroneous. However, based upon the jury's compensatory award, the manner in which Exxon was less than forthcoming about the NORM contamination on the Grefer property/ ITCO leasehold when weighed against the size of Exxon's bureaucracy and the potential for causing mass hysteria in the community if the disclosure was made in less than a care-

ful manner after discovery of the NORM problem, warrants an award of twice the compensatory damage award as the highest figure that a reasonable jury could award in view of *Campbell.*

TOBIAS, J., CONCURS IN THE DENIAL OF THE REHEARING AND ASSIGNS REASONS.

I respectfully concur in the denial of the rehearing in order to assign additional reasons in support thereof.

In our original opinion, we discussed at some length the cases of *Roman Catholic Church of Archdiocese of New Orleans v. Louisiana Gas Service Co.*, 618 So. 2d 874 (La. 1993) and *Corbello v. Iowa Production*, 02-0826 (La. 2/25/03), 850 So. 2d 686. However, we did not fully discuss the tension between them, which, in my view, makes the jury's determination of compensatory damages neither manifestly erroneous nor clearly wrong. In a supplemental application for rehearing, Exxon cites this court to *Hornsby v. Bayou Jack Logging*, 04-1297 (La. 5/6/05), ___ So. 2d ___, 2005 WL 1058888, 2005 WL 1058149, 2005 WL 1058898, a case decided by the Supreme Court while Exxon's application for rehearing in this case was pending before this court.

Corbello is a contract case decided by the Louisiana Supreme Court *after* the appeal in the case at bar was docketed in this court. *Roman Catholic Church* is not a pure tort case. Underlying the recovery in *Roman Catholic Church* is the Church's *contractual* obligation to the U.S. Department of Housing and Urban Development ("HUD") that required the Church to operate the property for low-income individuals for a fixed period of time, in default of which ownership of the property would revert to HUD. Thus, I find that it is reasonable to read the two cases *in pari materia.* Whereas, the Grefers' claims against ITCO sound in both contract and tort, their claims against Exxon are in tort.

In *Roman Catholic Church*, at the time of suit the Church had already expended a very substantial sum to restore the property. In context, that was reasonable. In *Corbello*, the plaintiff had not expended anything, yet was allowed to recover $33 million without any obligation to spend anything to restore the damaged thing. As I read *Corbello*, where the restoration (remediation) is contractual the restoration costs may include apparently speculative costs without an obligation to expend the money to restore, but where the remediation costs are tort based, only actual sums expended can be considered.

If the Supreme Court in *Corbello* read out of the contract at issue therein the word "reasonably," how can we find an award of $56 million by the jury is unreasonable?

We found that the Grefers had "both personal and economic reasons for wanting to restore their property to its original condition." We reached this conclusion, relying upon Judge Grefer's statements that (a) "he and his siblings want to restore the property, which has been in the Grefer family since 1875, to its original condition and not to the mere minimum DEQ standard"; (b) he and his siblings were "unable to sell or lease the contaminated property without exposing themselves to liability and they do not want to burden their children with this"; and (c) he expressed "grave concern about the effects the radioactive contamination might have on the neighbors and the general public." A trier of fact has the right to weigh that testimony and give it such weight as deemed appropriate.

One might assert that Judge Grefer was framing his answers to questions propounded to come within the ambit of *Roman Catholic Church*'s personal-to-the-owner test, ignoring the language in the case referring to the "homestead", i.e., one's personal dwelling (which is not the case of the Grefers). But again, this falls to the trier of fact to weigh and evaluate.

In my view, the Supreme Court's standards for recovery must be understood in the context of the whole body of the law respecting recovery of damages. Among these are the doctrine of waste and the reasonable person. How can we conclude in light of the damage award in *Corbello* ($33 million to remediate a property having a value of $108,000) that the $56 million award is unreasonable? One might argue that the Grefers will remediate the property down to levels that make it commercially viable and usable, i.e., levels within the guidelines of the Louisiana DEQ and/or levels that will satisfy a financial institution that it can safely lend money on the property without the exposure of having to remediate the property at substantial cost should the property come into the financial institution's ownership by virtue of foreclosure. But is that difference in dollars not a justified award? The plaintiffs will likely expend substantial sums in defense of third party claims and responding to any awards of damages.

Hornsby is distinguishable on its facts. The case addresses damages for the improper cutting of trees, where a special statute specified what damages were recoverable and the penalties associated therewith. In my view, a material difference exists between cutting of trees and contamination from radioactivity. A landowner can sell his property without trees on it, and the value of the land may be reduced because of the absence of the trees. However, land contaminated with radioactivity at a level which makes the land unmarketable or undevelopable because no financing entity will loan money thereon as discussed above, is something that is certainly very personal to the owner when the contamination is caused by a third person. Thus, Judge Grefer's testimony to the effect that he and his family are unable to sell or lease the contaminated property without exposing themselves to liability is something that comes within the ambit of something personal to the owner. Superimpose on this that, unlike *Roman Catholic Church* where the Church

had the financial resources to repair the damage, the Grefers are apparently without the financial resources to remediate their property without first recovering the funds to do so. Is not the jury's determination in this case reasonably within their discretion?

Finally, although some of the NORM was deposited upon the Grefers' property prior to the enactment of La. C.C. art. 2315.3, without doubt some of the NORM was deposited after the amendment to the Civil Code. Additional injury occurred to the Grefers after 1984 and the jury was within their discretion to determine that one could not remediate the pre-1984 contamination without remediating the post-1983 remediation.

APPENDIX D

LOUISIANA SUPREME COURT ORDER DENYING CERTIORARI REVIEW

THE SUPREME COURT OF THE
STATE OF LOUISIANA

JOSEPH GREFER, CAMILLE GREFER, ROSE MARIE GREFER HASSI AND HENRY GREFER

VS.

ALPHA TECHNICAL, ET AL.

No. 2005-C-1590

IN RE: Exxon Mobil Corporation; - Plaintiff; Applying for a Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. A., Nos. 97-15004; to the Court of Appeal, Fourth Circuit, No. 2002-1237

March 31, 2006

Denied.

BJJ

PFC

CDK

CDT

JTK

VICTORY, J., would grant.

WEIMER, J., would grant.

Supreme Court of Louisiana
March 31, 2006

s/ (illegible)
Deputy Clerk of Court
For the Court

APPENDIX E

JURY INSTRUCTIONS

[R.56:159]

Under our law, in addition to the award of damages to compensate a plaintiff for the injuries suffered, you may award exemplary damages against a defendant when the plaintiff shows that the defendants were wanton or reckless in their disregard for public safety in the storage, handling or transport of hazardous or toxic substances.

For the purposes of awarding [R.56:160] exemplary damages, "wanton" and "reckless" mean something more than mere negligence. The defendant must have known that public safety was at risk or should have known it was highly probable that harm to the public would result from his conduct. In other words, in order to find "wanton" or "reckless" conduct, a plaintiff must prove the defendant's alleged acts and omissions of negligence were accompanied by a conscious indifference to consequences amounting almost to a willingness that harm to the public safety would follow.

Exemplary damages are regarded as a fine or penalty for the protection of the public interest. Such damages are given to the plaintiff over and above the full compensation for the plaintiff's losses for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example. Exemplary damages are not awarded to benefit the injured party but to compel the wrongdoer to have due and proper regard for the rights of the public. You should award an amount of exemplary damages which you feel will be reasonably likely to accomplish that purpose in this case.

Another factor you may consider in [R.56:161] determining the amount of the exemplary damage award is the nature and the extent of the harm to the plaintiffs. You may also consider each defendant's financial position when determin-

ing the amount of exemplary damages to be awarded because the award is meant to be meaningful enough to actually deter the wrongful conduct.

Even if you decide that the plaintiffs are entitled to exemplary damages, you may not award such damages for conduct that the defendants engaged in before 1984 or after 1996.

Exemplary damages are within your discretion. This means even if you find that the defendant's conduct was wanton or reckless, you are not required to award exemplary damages to the plaintiffs.

No. 05-1670

JUL 24 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

JOSEPH GREFER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

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QUESTION PRESENTED FOR REVIEW

In this case, a Louisiana jury held Exxon Mobil Corporation liable for $56 million dollars in clean-up and restoration costs as a result of Exxon's contamination of the Grefer family's property. In addition, the jury awarded one billion dollars in punitive damages against Exxon.

On appeal the Louisiana Court of Appeal for the Fourth Circuit painstakingly reviewed the facts, and after a determination that Exxon had indeed acted in a manner to warrant the imposition of punitive damages, rigorously and thoughtfully applied U.S. Supreme Court precedents and reduced the jury's punitive damage verdict to $112 million (a 2:1 ratio between punitive damages and compensatory damages).

The sole question presented to the Court is whether this Court should review the Louisiana Fourth Circuit's decision, considering the Fourth Circuit's strict adherence in this case to the principles enunciated by this Honorable Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576-77, 580, 581 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

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consisted of concentrated Radium-226, Radium-228, and their daughter products, collectively known as Technologically Enhanced Radioactive Material (TERM).[2] At Exxon's direction[3], ITCO cleaned Exxon's pipes and allowed the waste to enter the environment in an uncontrolled fashion. R. 33:14-18, 34:48-52. Specifically, the radioactive scale fell from the pipes onto the ground when the pipes were transported in and around the yard, off-loaded by crane or forklift, and cleaned by both portable and stationary air rattling machines. *Id.*; R. 33:38-41, 34:49; Pl. Ex. 40-50. These rattling machines used high pressure air compressors that generated radioactive dust clouds. R. 33:17-19, 34:38. Aside from the deposit of scale from ITCO's cleaning operations, the radioactive scale in the pipes was also randomly *buried* and used as road and pipe rack building materials throughout the yard daily during all years of operations. R. 33:39-41, 34:48-52; ITCO Ex. 193(D). Estimates of the average amount of scale indicate that as much as *1.5 million pounds* of scale per cleaning machine was dispersed in the yard *each year.* R. 33:26, 29:10. *This waste was never removed from the yard, nor was there any record of a cleanup (of any sort).*

The Grefers first discovered the existence of oilfield radioactive waste on their property on October 29, 1996,

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[2] The acronym TERM refers to the radioactive scale deposits found in used oilfield drilling pipe. The acronym NORM is also used to describe that condition. See *Grefer v. Alpha Technical,* footnote 11; Petr. App. 12a. The evidence revealed that one of the daughter products of Radium is Lead-210, which is chemically toxic as well as radioactive. The decay of radium also generates Radon gas, which is a known human carcinogen.

[3] Exxon maintained offices at ITCO for its employees who managed materials, oversaw quality control, and supervised ITCO. R. 33:11-12, 46:40-41. The Grefers had no involvement with the industrial activities conducted by ITCO and Exxon on the property. R. 39:115-18.

when Judge Joseph Grefer, one of the four co-owners of the property, received a sampling report and laboratory analysis confirming that the property was contaminated with Radium, a radioactive material. R. 20:4946-48.

(2) Exxon's Conduct, Its Motivations For Such Conduct, And The Effect Of Exxon's Conduct On The Grefer Family And Their Property.

In determining that an award of punitive damages was appropriate in the amount of $112 million, The Fourth Circuit concluded that Exxon's actions in despoiling the Grefer property resulted from its "callous, calculated, despicable and reprehensible conduct during the time-period in question" (Petr. App. 68a.) which showed that Exxon had no concern for human safety, "and even less concern about the property damage it caused" to the Grefer family. Petr. App. 68a. Indeed, the following facts – which, incidentally, were not mentioned in Exxon's Writ Application – clearly support such a finding:

Exxon first learned of NORM contamination in oilfield drilling equipment in 1981, when Occidental Petroleum Corporation discovered it on its platforms in the North Sea. Petr. App. 6a. Following the discovery, the U.K. National Radiological Protection Board ("NRPB") did further testing and identified the radioactive component as Radium-226; Petr. App. 7a. All major oil companies operating in the North Sea, including Exxon, were immediately made aware of Occidental's discovery through the United Kingdom Offshore Operator's Association ("UKOOA") the oil industry trade association. Petr. App. 7a. As a result of Occidental's discovery, the U.K. government held a conference in 1983 for all major oil companies operating in the North Sea, including Exxon, dedicated solely to the NORM problem. Petr. App. 7a.

In 1985, the UKOOA Safety Committee drafted and published safety guidelines and a reference manual that were distributed to all oil companies. The reference manual extensively covered both the identification of radioactive scale in wells and the procedure to follow up on such identification. Petr. App. 7a. Upon reviewing these guidelines, important Exxon officials felt that the guidelines were too onerous, restrictive, inflexible and unreasonable for Exxon's production operations in the United States. Petr. App. 45a. However, Exxon's own hygienist admitted that had Exxon surveyed its U.S. wells sooner than 1986, it would have discovered radium in its wellheads sooner. Petr. App. 45a.

Chevron discovered NORM contamination in its well sites in Mississippi in 1986. In May 1986, after learning of Chevron's discovery, Exxon surveyed its Mississippi well sites and confirmed the presence of radiation in its equipment. Twice Exxon officials were notified that its cleaning contractors had to be informed of the radioactivity, since it posed a health and safety hazard, but Exxon still did nothing to warn them. Petr. App. 45a.

In fact, an internal memorandum written in August, 1986 by Exxon's then Director of Environmental and Regulatory Affairs showed that Exxon's "prime concern" after Chevron's NORM discovery wasn't health and safety or property clean-up – it was to get the oil industry and federal regulatory agencies to "slow down" the investigation into NORM contamination out of fear that the Environmental Protection Agency ("EPA") would increase its regulation and would eliminate the "produced water" exemption under the Resource Conservation Recovery Act ("RCRA"). Under that exemption oil companies such as Exxon are allowed to dispose of water produced during drilling operations in an unregulated manner. Petr. App. 45a-46a.

Exxon's entirely selfish motivations were further demonstrated by evidence that the same Exxon official,[4] at a meeting of Exxon executives concerning NORM in January, 1987, calculated that the loss to Exxon if it were to lose its produced water exemption would be $750 million in the first year and $150 million for each subsequent year. Petr. App. 46a.

At the same meeting several Exxon officials concluded that notifying pipe-cleaning contractors such as ITCO about the health and safety risks of NORM was "premature". Petr. App. 46a. This was contrary to the advice of an Exxon hygienist who had earlier opined that cleaning contractors such as ITCO *had* to be notified of the presence of radioactivity. Petr. App. 7a-8a.

Another confidential memo written by another Exxon executive in October, 1986, showed that Exxon wanted to downplay the NORM problem because of Exxon's potential exposure to litigation. The memo noted that litigation against Chevron by one of its pipe yard contractors had followed Chevron's disclosure of NORM contamination. The same memo noted that ITCO was a potential "look alike" to the Chevron contractor and suggested Exxon perform "low key" radiation exposure measurements. Petr. App. 46a.

Exxon did not send any notification to ITCO until March, 1987 – five months after the October, 1986 memo, and ten months after it had identified the NORM problem at its domestic well sites, *causing further (and still unrestricted) contamination of the Grefer property*. Even then, Exxon downplayed the problem. In a videotape played for ITCO's president, Exxon portrayed the health risks associated with

[4] The same Exxon official also wrote that Chevron's discovery was "nothing new". Petr. App. 45a-46a.

NORM as minor, and the safety procedure guidelines as merely suggestive of taking precautions to avoid breathing or ingesting airborne dust. Petr. App. 46a-47a. *Exxon's inadequate warning did nothing to protect the Grefer property from further contamination or to address the problem already existing at the property.*

Even after Exxon no longer used ITCO as a cleaning contractor, Exxon was aware that contaminated equipment remained stockpiled on the Grefer property and was further aware of the danger posed by NORM-contaminated scale; *yet Exxon took no step to remove its radioactive material from the Grefer property.* Petr. App. 50a-52a.

At no point, did Exxon notify or warn the Grefer family about the contamination at their property. R.20:4946-48. *Rather, Exxon knowingly and intentionally left the Grefer family with a huge mess.* As a result of the radioactive contamination described above, the Grefers' long-held family property was despoiled. Petr. App. 51a. *Exxon's actions financially burdened the Grefers with the task of cleaning up the property.* Petr. App. 51a. That burden, according to the jury, was $56 million (not the $1.5 million market value of the land asserted by Exxon). (Pet. 28). This was less than the estimate of plaintiff's expert, Mr. Stanley Waligora, and more than that of Exxon's expert.[5] Petr. App. 33a-34a. The Fourth Circuit determined that

[5] Mr. Waligora's remediation plan was based not only on State of Louisiana, Department of Environmental Quality Regulations, but also on the more stringent United States Environmental Protection Agency ("EPA") and Nuclear Regulatory Commission ("NRC") guidelines. Petr. App. 33a-34a. Given the twenty-four year history of significant and unrestricted non-homogeneous contamination at the Grefer tract, Mr. Waligora's plan also called for the removal and testing of the top two feet of soil at the site to ensure that the *entire* property was safe. R. 29:22, 29:36, 33:163-64, 33:166.

there was sufficient evidence to support the jury's award, and left the award undisturbed. Petr. App. 61a; 67a-68a. That judgment is now final.[6]

Exxon's actions have not only exposed the Grefers to the expense of defending claims brought by third parties as a result of the contamination of the Grefer property but have also exposed the Grefers to significant potential liabilities. Petr. App. 71a. In fact, a number of suits have already been instituted against the family.

B. Proceedings Below

The Grefers filed the instant suit in August of 1997 to recover damages for the burial, concealment, and disposal of radioactive scale throughout the Grefer tract. They sought compensatory damages for the costs of restoration, general damages associated with the damage to the Grefer tract, and exemplary (punitive) damages under Louisiana Civil Code art. 2315.3. Resp. App. 5a. After a five-week trial, the jury found Exxon 85% at fault, ITCO 5% at fault, and two absent defendants 10% at fault. The jury rendered a verdict of: (1) $56,000,000.00 for the cost of remediating the contamination at the Grefer tract; (2) $145,000.00 in general damages associated with the damage to the Grefer tract; and (3) one billion dollars in punitive damages assessed against Exxon. Both Exxon and ITCO appealed the jury's verdict. The Fourth Circuit affirmed the judgment in its entirety but reduced the punitive award to an amount equal to twice the compensatory damage award. Petr. App. 61a, 67a-69a. Both the

[6] Indeed, Exxon has unconditionally paid that amount, with interest, to the Grefer family. *See* Exxon's Motion For Stay and Renewed Motion For Stay, *ExxonMobil v. Grefer, Joseph, et al*, No. 05A981.

plaintiffs and Exxon applied for Writs of Certiorari to the Louisiana Supreme Court. The Louisiana Supreme Court denied both Writ Applications on March 31, 2006. Petr. App. 73a.

On or about April 5, 2006, seeking to stay execution of the punitive damage award, Exxon filed in the Supreme Court of Louisiana an "Emergency Motion to Stay Execution of Judgment". The court denied the Motion on April 24, 2006. Resp. App. 3a-4a.

On April 27, 2006, Exxon filed a Motion to Stay in this Honorable Court. Justice Scalia denied the Motion on May 1, 2006. *See Exxon Mobil Corporation v. Grefer, Joseph, et al,* No. 05A981. On May 1, 2006, Exxon filed a Renewed Motion to Stay, which was referred to all members of this Court, and was then denied on May 15, 2006. *See Exxon Mobil Corp. v. Grefer,* 126 S. Ct. 2056 (2006).

Exxon now applies to this Honorable Court for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit.

REASONS FOR DENYING THE PETITION

This Court has already examined the same issues raised by Exxon in its petition, as they relate to this case. *Id.* On May 1, 2006, after having been denied a stay by Justice Scalia, Exxon filed a renewed application for stay, directing it to Justice Kennedy. *Id.* Exxon's renewed application was promptly referred to the entire Court and denied on May 15, 2006. *Id.*

Now, fully appreciating (though not mentioning) the implications of this Court's stay denial, Exxon focuses its brief on an entirely different lawsuit – *Philip Morris USA*

v. Williams, *cert. granted*, 126 S. Ct. 2329 (No. 05-1256) (2006). The reason for this, of course, is that *Williams*, unlike this case, involves issues which the Court has already determined merit review. Indeed, each of Exxon's three "reasons for granting the petition" incorporate a request that a grant of certiorari in this case be tied, in some way, to this Court's ultimate holding in the *Williams* case. Pet. 9, 16, 17, 22, 27, 30. Exxon's hope is that the Court will indefinitely delay an outcome in this case pending a decision in *Williams*, and then, without further review or discussion, send this case back to the Louisiana state court for a new trial on the punitive damages award. Exxon's overt attempt to "piggy back" its way to a grant of certiorari and subsequent reversal in this case is fatally flawed.

First, Exxon assumes that the issues in *Williams* are present in this case. As discussed below, the only common element that the *Williams* case and this case share is that both involve a due process challenge to a punitive award. The issues this Court felt worthy of review in *Williams* are simply not issues in this case.

Second, Exxon ignores the fact that certiorari was granted in *Williams* only fifteen days after the stay application in this case was denied. Presumably, this Court was aware of the issues in the *Williams* case when it denied the stay in this case, yet it did not grant the stay application.

Third, this Court denied certiorari only two months earlier in another smoker personal injury case – *Philip Morris USA v. Boeken*, *cert denied*, 126 S. Ct. 1567, 164 L.Ed.2d 297, 74 USLW 3308 (2006). The denial of certiorari in *Boeken* demonstrates that Exxon is reading too much into the grant of certiorari in *Williams*, stretching and pulling the issues in that case as far as possible,

desperately trying to demonstrate that this case will somehow be affected by the Court's ultimate decision in *Williams*.

Once the Court properly removes the layers and layers of *Williams* "tie-ins" from Exxon's Petition for a Writ of Certiorari, there is little more to Exxon's petition than a general complaint about the outcome in this case (i.e., according to Exxon, the entire Louisiana court system erred, as a matter of law and on a constitutional level, by reducing the award from 18:1 to 2:1, instead of 1:1). That is far from sufficient to justify this Court exercising its supervisory review. As Supreme Court Rule 10 makes abundantly clear, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. Rule 10.

The decision of the Fourth Circuit Court of Appeals for the State of Louisiana is sound. It is a well-reasoned and detailed opinion that follows this Court's guidance in *BMW*, *Cooper*, and *State Farm* to the letter. There is simply no reason for the Fourth Circuit or a new jury (as suggested by Exxon) to reconsider the judgment in this case. Exxon's conduct was wanton and reckless under Louisiana law.[7] Petr. App. 48a. A Louisiana jury rendered a punitive award to punish and deter that conduct. Petr. App. 64a. The Louisiana Fourth Circuit reduced the award by almost $900 million, taking into consideration due process constraints. Petr. App. 57a. The Louisiana Supreme Court refused to grant writs and denied Exxon's subsequent stay application. Resp. App. 3a-4a. This Court

[7] In fact, the Fourth Circuit called Exxon's conduct "callous, calculated, despicable and reprehensible." Petr. App. 68a.

denied Exxon's stay application, taking into consideration the likelihood of a grant of certiorari and/or an ultimate reversal of the decision. *See Exxon Mobil Corporation v. Grefer, stay denied,* 126 S. Ct. 2056 (2006). Exxon is looking for relief that is not justified by the facts and the law in this case. Yet, Exxon continues to seek relief from this, the highest court in the land.

I. THE JURY'S CONSIDERATION OF THE RISKS POSED BY EXXON'S CONDUCT TOWARDS NON-PARTIES WAS PROPER; MOREOVER, THE LOUISIANA FOURTH CIRCUIT'S DECISION ENSURED THAT NON-PARTY HARM WAS NOT THE BASIS OF THE PUNITIVE AWARD, AND, CONSEQUENTLY, RESOLUTION OF THIS LAWSUIT SHOULD NOT BE PROLONGED PENDING A DECISION IN THE *WILLIAMS* CASE.

A. The Fourth Circuit's Decision Is Consistent With *State Farm* And *BMW* In All Respects.

At the outset of its first argument, Exxon details record evidence relating to the risks Exxon's conduct posed to the public, as well as jury instructions in any way referencing the risks Exxon's conduct posed to the public. Pet. 10. Exxon wants this Court to believe that the trial of this matter was "tainted" by improper evidence and instructions relating to non-parties and, by extension, the award must have been "tainted." Nothing could be further from the truth.

A preliminary problem with Exxon's position is that neither the evidence listed nor the jury instructions mentioned in Exxon's Petition were raised as a basis for reversal during Exxon's appeal. Petr. App. 14a. In fact, a

number of the "objectionable" exemplary damage instructions mentioned by Exxon in its Petition were *proposed by Exxon*. *See, e.g.*, R. 18:231; Resp. App. 1a-2a.

Another problem with Exxon's position is it ignores Louisiana law. Article 2315.3 of the Louisiana Civil Code (Resp. App. 5a) provided for punitive damages, during the time period in question, if the plaintiff's harm was caused by the "wanton or reckless disregard of *public safety* in the storage, handling, or transportation of hazardous or toxic substances." LA. CIV. CODE art. 2315.3 (Resp. App. 5a) (repealed 1996) (emphasis added). The evidence submitted by the Grefers relating to the risks to the public posed by Exxon's conduct was *required* to demonstrate a violation of this statute and, as such, was properly admitted.

Even if the risks posed to non-parties by Exxon's conduct was not required to demonstrate a violation of Louisiana Civil Code art. 2315.3 (it was), such evidence could be admitted as it was related to the reprehensibility of Exxon's conduct.[8] Under *BMW*, one of the factors to consider when determining the reprehensibility of a defendant's conduct is whether or not the conduct "evinced an indifference to or disregard of the health or safety of others." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576-77 (1996). Consistent with that, *State Farm* instructs that the possible effects of a defendant's conduct on non-parties may be considered when assessing reprehensibility. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-23 (2003). However, Exxon argues that the evidence considered falls under the exception to this rule because, according to Exxon, the conduct towards non-parties in

[8] This is one of the many reasons that the various instructions relating to such evidence were properly given.

this case has no "nexus to the specific harm suffered by the plaintiff." Pet. 11. This argument ignores the facts.

State Farm instructs that "evidence of other acts need not be identical to have relevance in the calculation of punitive damages." *State Farm*, U.S. 538 at 423. Faced with the Utah court's consideration of and reliance upon wholly unrelated out-of-state conduct, the Court also held that non-party conduct bearing "no relationship" to or having "nothing to do with" the harm to the plaintiff(s) cannot be used to support the constitutionality of a punitive award. *Id.* at 422, 424. In this case, Exxon's conduct towards the ITCO employees who worked at *the Grefer tract* and the homeowners who lived around *the Grefer tract* is inextricably intertwined with (and, in some instances, identical to) Exxon's conduct towards the Grefers and their property (i.e., *the Grefer tract*).

For twenty-four years, Exxon directed that its pipe service contractor clean used oilfield tubing contaminated with radioactive materials. R. 33:14-18, 34:48-52 ("The evidence in the record indicates that radioactive scale was discharged from the used oilfield pipes from the 1960s through 1992 when ITCO terminated its lease."); Petr. App 42a. This waste was distributed throughout the Grefer property during that time frame. Petr. App. 42a; R. 33:17-19, 33:38-41, 34:38, 34:48-52. When Exxon discovered that there was a risk associated with its operations, it did nothing to warn ITCO for almost a year and, in turn, *allowed the Grefer property to be further (and unrestrictively) contaminated during that time*. Petr. App. 5a-7a. The "warning" finally given, according to the record evidence, downplayed the risks and failed to fully inform ITCO about the problem. Petr. App.8a. ("Exxon's representatives made no mention of the possible build-up of radioactive

scale on ITCO's premises even thought it knew pipe scale had been accumulating on the premises for years and had learned in June 1986 that it was hazardous."), Petr. App. 47a; R. 36:151, 154, 46:46-50, 47:20. More importantly, Exxon *never* told the Grefers about the contamination at the site. It certainly never warned them about anything.[9] Rather, Exxon *continued* to send pipe to ITCO for cleaning at the Grefer property.[10] R. 47:39. *Six years later*, when Exxon finally decided that the potential liabilities associated with the continued disposal of radioactive material at the Grefer tract had become too great, it stopped sending pipe to ITCO (effectively putting it out of business) and abandoned the yard, *leaving its radioactive material at the*

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[9] The record evidence indicates that the Grefers first learned of the existence of oil field radioactive waste on their property on October 29, 1996, when Judge Grefer, one of the four co-owners of the property, received a sampling report and laboratory analysis from the attorney of an ITCO worker confirming that the property was contaminated with Radium, a radioactive material. R. 20:4946-48. The surrounding neighborhood was likewise left in the dark by Exxon.

[10] After March of 1987, screening procedures were established by ITCO. R. 33:36-37; R. 46:52-53. However, the record evidence demonstrates these screening procedures did not prevent additional radioactive scale from contaminating the Grefer tract. As Mr. Waligora pointed out at trial, "you can't always tell what's in the pipe from an outside measurement." R. 36:167-68. For example, Exxon had taken a measurement outside of a pipe which read background, and when the scale inside the pipe was measured, it read 170 pCi/g. R. 38:132-36. Furthermore, ITCO's pipe measurements were fundamentally flawed as an ITCO worker testified that he usually obtained his background reading by sampling soil (one sample) approximately 10 to 15 feet away from where he was about to measure. R. 33:37. Inflated background readings can lead to the cleaning of pipe emitting unsafe levels of radiation. Finally, even the segregation process would have led to contamination. Trial testimony indicated that scale was frequently dislodged from pipes as they were moved from place to place. R. 33:41.

Grefer tract. Petr. App. 52a; R. 47:39-40. In short, the Grefers were left "holding the bag".

The Grefers, as the landowners, faced (and still face today) significant potential liabilities with respect to the ITCO workers and to the surrounding neighbors.[11] The Grefers also faced potential state and federal enforcement actions (as well as associated fines) for storing radioactive material without a license. *See, e.g.,* LA. ADMIN. CODE tit. 33, § 1401 et seq.; LA. REV. STAT. ANN. § 30:2025 (E)(1)(a). Not having the funds required to clean such extensive contamination, the Grefers' potential liabilities grew with each passing day. Given the significant cloud on their title, the Grefers could not even sell or transfer the property to stop the bleeding.

Certainly, Exxon's conduct towards ITCO, its workers and the surrounding neighbors has a "nexus" to the harm suffered by the Grefers.[12] As the Fourth Circuit held:

> . . . In reviewing an award of punitive/exemplary damages, we have the responsibility of looking to the callous, calculated, despicable and reprehensible conduct of Exxon during the time period in question. Even though this case is not a personal injury claim by the ITCO workers, the mindset of Exxon should be considered in deciding whether the sum awarded was appropriate. The fact that Exxon showed no regard for ITCO's workers, i.e., no concern for human safety, certainly *demonstrates that it had even less concern*

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[11] While Exxon eagerly pointed out the cases it is being sued in as a result of its conduct at the Grefer tract, it failed to mention that *the Grefers are also defendants* in those suits. Pet. 11.

[12] "Nexus" is defined simply as a connection or a link. WEBSTER'S NEW COLLEGIATE DICTIONARY 569 (7th ed. 1963).

> *for the property damage that it caused, thus further demonstrating the morally culpable nature of its conduct. Grefer v. Alpha Technical*, 901, So.2d 1117, 1154-55 (La. App. 4th Cir. 2005), writ denied, 925 So.2d 1248 (La. 2006); Petr. App. 68a, (Emphasis supplied).

The Fourth Circuit's conclusion that a nexus exists between Exxon's conduct towards non-parties and the harm to the Grefers is amply supported by the record. For instance, Exxon's failure to tell *anyone* about the contamination at the Grefer tract (whether for one year in the case of ITCO or *never* in the case of the Grefers) not only put ITCO's workers and the surrounding neighbors at risk *but also led to further contamination of the Grefer tract.* Additionally, its failure to properly warn ITCO (when a warning was finally given) and its failure to implement adequate screening and handling procedures at the yard, not only put ITCO's workers and the surrounding neighbors at risk *but also led to even more contamination.* Most importantly, Exxon's failure to remediate its damage (at any point) not only put ITCO's workers and the surrounding neighbors at risk *but also left the Grefers with a huge mess.*[13]

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[13] This was clearly a fact the Court considered during its reprehensibility analysis. When discussing the financial vulnerability factor, the Court found that the Grefers "are now financially burdened with the task of remediating the property." Petr. App. 51a. Later in its reprehensibility analysis, the Court also found that "Exxon took no step to remove the radioactive material" from the Grefer tract. Petr. App. 52a. Exxon's assertion that the Fourth Circuit found Exxon's conduct reprehensible based "solely" on "Exxon's failure to give timely notice to ITCO" is flatly controverted by these portions of the Fourth Circuit's reprehensibility analysis.

Additionally, the risk posed by Exxon's conduct towards ITCO's workers and the surrounding neighbors is *directly* related to the potential harm to the *Grefers*. To be specific, given the fact that the Grefers are *potentially liable to third parties under Louisiana law* (as owners of the property), the nature and extent of the risks posed to third parties demonstrates this potential harm to the Grefers and, in turn, is a valid consideration under the second *BMW* guidepost. *See State Farm*, 538 U.S. at 425 (confirming that the second BMW guidepost considers the ratio between the "harm, or potential harm, to the plaintiff and the punitive damages award").

Though Exxon quotes *State Farm* and *BMW* extensively, it fails to demonstrate that any portion of *State Farm* or *BMW* has been ignored or challenged. The reason for this is simple. The Fourth Circuit's opinion follows this Court's guidance to the letter.

B. Resolution Of The Issues This Court Deemed Worthy Of Review In *Williams* Would Have No Bearing On The Outcome Of This Case.

At the very beginning of its argument on the non-party harm issue, Exxon, pointing to the grant of certiorari in *Williams*, makes the following general statement: "The decision below presents a critical issue that this Court has already deemed worthy of review: whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties." Pet. 9. There are a number of problems with Exxon's statement.

While Exxon properly cites the *second* issue this Court deemed worthy of review in *Williams*, it entirely ignores/disregards the *first* issue made subject to the grant

of certiorari. That first issue, which asks whether or not the reprehensibility guidepost can override an otherwise unconstitutional ratio, necessarily controls and limits the second issue. Put another way, utilizing reprehensibility (a guidepost that, in part, considers conduct directed at non-parties) to "trump" a ratio which, considering the harm to the *plaintiffs*, is constitutionally excessive, raises concerns that the award may be punishing a defendant for harms to non-parties. Limited by the first issue in this respect, the second issue appears far less expansive than Exxon suggests. After all, *standing on its own*, the issue of whether a defendant can be punished for harm to non-parties has already been answered by this Court. *See State Farm*, 538 U.S. at 423. It is an established rule of law that does not require the Court's review.[14] *See id.*

Appreciating the apparent scope of the second issue in *Williams*, the question becomes: What, if any, effect would resolution of that issue (or the first issue for that matter) have on this case? The answer is *none*.

In *Williams*, a smoker personal injury suit, the Oregon Supreme Court conceded that the almost 100:1 ratio in the case was constitutionally excessive *but then* held that the harm caused by Philip Morris' highly reprehensible conduct (much of it being extra-territorial conduct) justified the award.[15] *Williams v. Philip Morris, Inc.*, 127 P.3d

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[14] Even if the Court intends to consider this issue in the more general sense asserted by Exxon, as will be discussed below, the punitive award does not punish Exxon for the effects of its conduct on non-parties. Consideration of that issue, therefore, would have no bearing on the outcome of this case.

[15] Extra-territorial conduct, a significant concern when considering the propriety of punitive damage awards (as the states are generally supposed to limit punishment to conduct within their respective borders), is not at issue under the facts of this case. The conduct at

(Continued on following page)

1165, 1181-82 (Or. 2006), *cert. granted*, 126 S. Ct. 2329, 74 USLW 3572, 74 USLW 3665, 74 USLW 3668 (2006) (No. 05-1256). In fact, the court specifically relied upon the harm to non-parties (most of whom did not live in Oregon) as its basis for upholding the award. *Id.* This is, at least arguably, a departure from the guidance of *BMW* and *State Farm*.

Unlike the almost 100:1 ratio in *Williams*, the 2:1 ratio in this case is not constitutionally excessive under *BMW* or *State Farm* (this issue is discussed extensively in Section III below). Furthermore, unlike the situation in *Williams*, *harm* to non-parties was never discussed or considered by the Fourth Circuit. Petr. App. 48a-57a. Even the *risk* posed to non-parties by Exxon's conduct was *only* considered during the court's reprehensibility analysis. Petr. App. 50a-55a. In fact, though it was not the reason for its reduction,[16] the court noted during its ratio analysis that the evidence of *risk* to the surrounding neighbors and Exxon's wealth (both properly before the jury under Louisiana law) possibly contributed to the ratio being constitutionally excessive.[17] Petr. App. 54a-55a. As the

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issue in this case occurred *within Louisiana's borders, at a Louisiana property*. Petr. App. 10a.

[16] It is clear from a plain reading of the Fourth Circuit's decision that the reduction to 2:1 was based on this Court's ratio discussion in *State Farm* (and nothing else). Petr. App. 52a-53a ("Considering the substantial compensatory damages awarded in this case, in our opinion a lesser single digit ratio would be appropriate.").

[17] For the reasons set forth in Section I.A. above, the Grefers disagree with the Fourth Circuit's assertion that the evidence of risk to the surrounding neighbors was "irrelevant." Indeed, the court's statement conflicts with its holding that, to demonstrate a violation of article 2315.3, the Grefers had to prove that "the danger created by [Exxon's] wanton or reckless conduct threatened or endangered public safety." Petr. App. 44a.

Fourth Circuit expressed concern that the *risk posed to non-parties* may have factored into the jury's excessive punitive award, there is no possibility that the court relied on *non-party harm* as a basis for its punitive award in this case.[18] This is supported by the fact that the court focused solely on *the Grefers' actual harm* ($56,145,000) when it concluded that the $112,290,000 punitive award in this case is constitutionally permissible. Petr. App. 57a.

As reprehensibility was *not* used to support a constitutionally excessive ratio in this case, resolution of the issues in *Williams* will have no bearing on the Fourth Circuit's opinion. Moreover, given the fact that the 2:1 ratio in this case was based solely on the actual harm to the *plaintiffs*, there is no risk of duplicative punishment. For these reasons, in addition to the fact that Exxon's writ issue has no independent merit and should be denied, holding this case pending resolution of the *Williams* case would be entirely unwarranted.

II. THIS COURT HAS ALREADY HELD THAT THE STATES MAY CHOOSE THE PROCEDURE THEY DEEM APPROPRIATE TO ENSURE THAT PUNITIVE AWARDS COMPORT WITH DUE PROCESS, AND ANY PURPORTED CONFLICT IN THE LOWER COURTS EITHER IS A BY-PRODUCT OF THAT DISCRETION OR RELATES TO IMPROPER JURY CONSIDERATIONS NOT AT ISSUE IN THIS CASE.

Exxon *specifically requested* that the Fourth Circuit reduce the punitive award in this case. Petr. App. 14a.

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[18] The Fourth Circuit made this point abundantly clear in its rehearing denial. Petr. App. 68a.

Nevertheless, Exxon now argues, without jurisprudential support, that due process protections entitled it to a new trial on punitive damages, rather than a reduction to constitutional limits. Pet. 18-19.

In an attempt to justify its argument, Exxon asserts, in very contradictory fashion, that the Court has not yet addressed the issue. To be specific, on the one hand, Exxon claims that "BMW asked this Court to address this issue . . . but it did not ultimately reach that issue." Pet. 18. On the other hand, Exxon recognizes that the Court held "therein" that the "appropriate remedy" for the constitutional error "is a matter that should be addressed by the state court in the first instance." *Id.* How can Exxon interpret that to mean that this Court did not reach the issue? Of course the Court reached the issue, and its answer was very clearly that the remedy is a matter of state concern. As the issue is a procedural one, this Court has left the choice between reducing an award to constitutional limits and ordering a new trial to the states. That is the current rule of law, and any conflict in the lower courts is a logical by-product of the various states handling procedure in the manner they deem appropriate. So long as due process protections are afforded by the state's procedure, this Court, under *BMW*, has indicated that it will not get involved.

The current rule of law, as established in *BMW*, is sound. The guideposts inherently protect against the courts considering non-party harm to justify an otherwise constitutionally excessive award. To be specific, the ratio analysis requires that the punitive award be proportionate to the actual and potential harm to the *plaintiff(s)*. *See State Farm*, 538 U.S. at 424. So, long as there is proportionality with respect to the *plaintiff's* harm, then the

court can rest assured that non-party harm is not at issue in the award (even if conduct directed towards non-parties was considered by the jury as an element of reprehensibility).[19] If, under state law, the lower court can achieve proportionality (where it is otherwise lacking) through a reduction to constitutional limits, this Court has indicated that such a procedure is acceptable. *See generally Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

Recognizing that the law on this issue is quite clear, Exxon argues that it should have received a new trial on the punitive damage award because the award was, according to Exxon, tainted by "improper" jury considerations. Pet. 19. The problem with this argument is that it is based entirely on an unsupported conclusion in an earlier Exxon argument (a by-product of trying to tie all its issues to the grant of certiorari in *Williams*). As was amply demonstrated in Section I above and, more to the point, in the Fourth Circuit's opinion, the evidence and instructions relating to the risks posed by Exxon's conduct towards non-parties were proper in light of both Louisiana Civil Code art. 2315.3 (Resp. App. 5a) and *BMW* reprehensibility considerations. Additionally, the evidence and instructions were proper because the risks posed by Exxon's conduct towards non-parties related directly to the *Grefers'* potential harm (i.e., potential legal liability). Exxon's argument, premised on the incorrect assumption that the evidence and instructions relating to conduct directed towards non-parties was improper, necessarily fails. The

[19] It is only when there is *not* proportionality and the court, nevertheless, upholds the award based on the reprehensibility guidepost (as was the case in *Williams*) that duplicative punishment issues arise.

four pages Exxon spends attempting to demonstrate a conflict in the lower courts over this issue are of no moment. Pet. 19-22. Even supposing those cases (the majority of which involve considerations of extra-territorial conduct not present in this case) demonstrate a valid conflict worthy of review, this case does not involve improper jury considerations. As such, there is no basis for this case to be the vehicle for that issue to be decided.

Moreover, Exxon's argument runs afoul of this Court's instruction in *Cooper*. Under *Cooper*, the constitutionality of punitive damage awards is to be reviewed *de novo*. *Cooper*, 532 U.S. at 436 ("Our decisions in analogous cases, together with the reasoning that produced those decisions, thus convince us that courts of appeals should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards.").[20] Exxon entirely disregards the *Cooper* rule when it argues that a court can only *sometimes* decide for itself what award would be sufficient to alleviate due process concerns. In essence, Exxon wants *de novo* review when its interests are served by such review, but otherwise, it wants a new trial by jury. That is an entirely unreasonable position and one which does not merit this Court's review.

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[20] The *Cooper* analysis mirrors Louisiana's long-existing law. The Louisiana Constitution provides for appellate review of both law and fact. When a Louisiana appellate court determines that trial errors may have influenced a jury's award, the appellate court is under a duty to review *de novo* the law and the facts and to render a judgment based upon that independent review. LA. Const. art. 5, § 10(B); *Temple v. Liberty Mutual Ins. Co., et al*, 330 So.2d 891, 892 (La. 1976) and *Riley v. Salley*, 874 So.2d 874, 878 (La. App. 4th Cir. 2004).

III. *STATE FARM* DID NOT IMPOSE A 1:1 CAP ON "SUBSTANTIAL" PUNITIVE DAMAGE AWARDS, AND EXXON'S ARGUMENTS THAT THERE IS A CONFLICT IN THE LOWER COURTS RELIES ENTIRELY ON THE EXISTENCE OF SUCH A CAP.

A. The 2:1 Ratio In This Case Is Entirely Consistent With *State Farm*.

Decided only three years ago, the *State Farm* decision provided further guidance with respect to the application of the *BMW* guidelines. For example, the Court instructed that "in practice, few awards exceeding a *single-digit ratio* between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425 (emphasis added). The Court also advised that "when compensatory damages are substantial, then a lesser ratio, *perhaps* only equal to compensatory damages, *can* reach the outermost limit of the due process guarantee." *Id.* (emphasis added). However, the Court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* It reaffirmed that "the precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.*

Exxon's argument that a 2:1 ratio in this case is excessive cuts against everything this Court held in *State Farm*. The Court did not state (or even imply) that 1:1 ratios are the absolute limit in substantial damage cases.[21]

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[21] The history of the *State Farm* case after this Court rendered its opinion supports the Grefers' position. Following the Utah Supreme Court's reconsideration of the punitive award against State Farm and consequent reduction to *a 9:1 ratio*, this Court denied writs. *Campbell*

(Continued on following page)

BEST A

It if it had intended to do that, it would not have said "*perhaps* only equal to compensatory damages" and "*can* reach the outermost limit of the due process guarantee." It certainly would not have declined again to impose a bright line ratio which punitive damages cannot exceed. Yet, Exxon argues fervently that there is a cap, and it is 1:1. Pet. 25, 28. Exxon is incorrect.

This is evidenced by the fact that this Court, only three months ago, refused to grant certiorari in the *Boeken* case, a smoker personal injury suit involving a 9:1 ratio between punitive damages ($50,000,000) and compensatory damages (approximately $5,500,000). *Boeken v. Philip Morris, Inc.*, 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638 (Cal. App. 2nd Dist. 2005), *cert. denied*, 126 S. Ct. 1567, 164 L.Ed.2d 297, 74 USLW 3308 (2006). Surely, a 9:1 ratio case involving such a substantial punitive damage award would have led to a grant of certiorari if the Court had intended to impose a 1:1 cap under *State Farm*. The fact that certiorari was denied in *Boeken* demonstrates that the 2:1 ratio in *this* case is not constitutionally excessive.[22] Exxon may want there to be a bright-line limit on punitive damage awards, but, as is evidenced by the *State Farm* decision and the denial of certiorari in *Boeken*, this Court is not willing to do that.

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v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409 (Utah), *cert. denied*, 543 U.S. 874 (2004).

[22] Consideration of the potential harm to the Grefers (e.g. potentia liability to ITCO's workers and the surrounding neighbors, potentia enforcement actions by environmental agencies, potential state an federal fines, etc. . . .) further supports the constitutionality of th punitive award in this case. After all, when the potential harm to th Grefers is added to the equation, as *BMW* instructs the courts to do, th ratio in this case is even lower than 2:1. *BMW*, 517 U.S. at 581.

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Recognizing that its argument that *State Farm* imposed a 1:1 ratio limit on substantial damage awards is a stretch among stretches, Exxon falls back to another (even less credible) argument. Specifically, Exxon asserts that, because the Grefer property only has a market value of $1.5 million, the ratio in this case is actually much higher than 2:1. Pet. 26, 29. This argument is thoroughly flawed. To begin with, it disregards the fact that there are no cases which have held that actual harm, for purposes of a punitive damage analysis, can be limited to certain portions of a compensatory award. Indeed, both *BMW* and *State Farm* confirm that the compensatory award, as a whole, comprises the plaintiff's actual harm. *BMW*, 517 U.S. at 580 ("[E]xemplary damages must bear a 'reasonable relationship' to compensatory damages."); *State Farm*, 538 U.S. at 425 ("ratio between punitive and compensatory damages"). The lower courts are consistent on this point.[23]

Exxon cannot dispute that the compensatory portion of this award, pursuant to the Louisiana Fourth Circuit's final and executable judgment, is $56,145,000.00. In fact, recognizing that there is no basis to challenge the compensatory award in this Court, Exxon has already paid that amount to the Grefers. In short, the actual harm in this case has been established by the Louisiana courts, and that amount has been satisfied. Exxon is foreclosed from arguing to this Court that a lesser amount is somehow the "true" measure of the Grefer's harm in this case.

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[23] Tellingly, all of the cases cited by Exxon at pages 26-27 of its Petition relate to the lower courts' consideration of the ratio between "punitives" and "*compensatories*." Pet. 26-27 (emphasis added).

Moreover, Exxon's argument ignores the fact that, under Louisiana law, plaintiffs are entitled to have their property restored, even if the cost of the remediation plan exceeds the value of the land.[24] *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Serv. Co.*, 618 So.2d 874, 879-80 (La. 1993). In other words, Louisiana law instructs that the Grefers' actual harm is the cost of clean-up.[25]

Common sense says the same thing. Without the $56 million restoration award in this case, the Grefers would not be in a position to conduct a clean-up that ensures that their entire property complies with state and federal

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[24] The limitations on this allowance are that the landowner must have "a reason personal . . . for restoring the property" or there must be "a reason to believe that the plaintiff will, in fact, make the repairs." *Roman Catholic Church*, 618 So.2d at 879-80. In this case, the jury found that at least one of these requirements was met and, in turn, awarded the amount it determined to be reasonable and necessary to effectuate a complete remediation of the Grefer tract. The Fourth Circuit agreed with the jury's assessment. App. 38a. Given the site history at the Grefer tract (a history involving twenty-four years of non-homogeneous burial of radioactive material), the Grefers properly demanded that *all* of their property (not less than 1%, as suggested by Exxon) be cleaned in conformance with both state and federal radiation regulations. This was the only way to ensure that the Grefers would be protected from not only environmental enforcement actions but also continuing liability to the vicinage. Exxon's argument that such an award is "grossly inflated" defies logic. Pet. 28. Exxon's attempt to interject the commentary of the Louisiana Department of Environmental Quality in "support" of its untenable position is misleading. Pet. 28-29. Indeed, it is difficult to think of a worse advocate for Exxon's position. The Louisiana DEQ is the same agency that, *as evidenced by the testimony of a DEQ employee at trial*, failed to enforce the Louisiana Radiation Regulations with respect to Exxon's activities at the Grefer tract for over two decades. R. 29:41, 32:117, 32:121-22, 32:135, 32:139, 32:141-42, 32:145, 33:184-87, 36:135, 36:169-70.

[25] Exxon does not challenge the constitutionality of this substantive law.

standards. In turn, the Grefers would be saddled with virtually never ending liability, and their actual and potential harm would *increase* with each passing day.[26] The Grefers would not be able to prevent new civil lawsuits, and they would have no way of complying with government enforcement actions. How can such an award not be considered the Grefer's actual harm?

B. The Fact That Every Substantial Punitive Damage Award Since *State Farm* Has Not Resulted In A 1:1 Ratio Does Not Mean That This Court Needs To Resolve A Conflict In The Lower Courts.

Exxon attempts to demonstrate a conflict in the lower courts with respect to the proper application of the *State Farm* decision by string citing punitive damage cases with varying results.[27] Pet. 26-27. Exxon's hope, of course, is that the "inconsistency" of those decisions will encourage this Court to instruct the lower courts that a strict 1:1 cutoff should be enforced in substantial damage cases. As was discussed above, it cannot be reasonably disputed that such an instruction would run counter to this Court's guidance in *State Farm*. This conclusion is supported by the fact that the *exact same request* was made in *Boeken*,

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[26] Radium-226 has a half-life of approximately 1600 years. R. 32:144.

[27] Looking for another tie-in, Exxon cites the *Williams* decision as its example of an extreme departure from *State Farm*. Pet. 27. It is ironic, however, that Exxon attempts to tie this issue into the grant of certiorari in *Williams*. Had Exxon carefully read Philip Morris' brief in the *Williams* case, it would have seen that Philip Morris argued that the 2:1 ratio in *this* case conforms with the Court's guidance in *State Farm*. Brief for Petitioner at 13, *Philip Morris USA v. Williams*.

and the Court denied certiorari. Brief for Petitioner at 14 *Philip Morris USA v. Boeken*.

Although *State Farm* does not say what Exxon asserts it does, there is another reason that the purported inconsistency in the lower courts does not merit this Court's review. As Justice Kennedy pointed out in his concurrence in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991):

> Some inconsistency of jury results can be expected for at least two reasons. First, the jury is empaneled to act as a decisionmaker in a single case, not as a more permanent body. As a necessary consequence of their case-by-case existence, juries may tend to reach disparate outcomes based on the same instructions. Second, the generality of the instructions may contribute to a certain lack of predictability. The law encompasses standards phrased at varying levels of generality. As with other adjudicators, the jury may be instructed to follow a rule of certain and specific content in order to yield uniformity at the expense of considerations of fairness in the particular case; or, as in this case, the standard can be more abstract and general to give the adjudicator flexibility in resolving the dispute at hand. *These features of the jury system for assessing punitive damages discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity.* (emphasis added at 41)

Because this Court has properly refused to impose a bright line limitation on punitive awards, such awards are bound to vary to some degree. However, this variance, as Justice Kennedy points out, "cannot be equated with constitutional infirmity." The cases cited by Exxon do not demonstrate a need for this Court's review. Moreover, this

case, which comports with *State Farm* in all respects, is not the appropriate vehicle for such a review.

CONCLUSION

Exxon's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: July 24, 2006

APPENDIX

APPENDIX A

EXXONMOBIL'S PROPOSED INSTRUCTION 17

EXEMPLARY DAMAGES - GENERALLY

In this particular case, Louisiana law permits you t consider an additional element of damages called exem plary damages (or called "punitive damages" in othe states).

~~You may only award exemplary damages if the plain tiffs prove, by a preponderance of the evidence, that:~~

~~(1) the defendant's conduct was wanton and reckless;~~

~~(2) the danger created by the defendant's wanton and reckless conduct threatened or endangered public safety;~~

~~(3) the defendant's wanton and reckless conduct occurred in the storage, handling, or transportation of hazardous or toxic substances; and~~

~~(4) The plaintiffs' damages were caused by the defendant's wanton and reckless conduct.~~

The phrase "wanton and reckless" means a consciou indifference to consequences, amounting almost to willingness that harm to the public safety would follow Stated another way, wanton and reckless conduct is tha which amounts to intentional and deliberate action tha has the character of outrage frequently associated wit crime.

Unless you find that the defendants acted with almos a willingness that harm to the public safety would follow then you may not award exemplary damages.

~~Even if you decide that the plaintiffs are entitled to exemplary damages, you may not award such damages for conduct that the defendants engaged in before 1984 or after 1996. [Illegible] Louisiana law, the plaintiffs are not entitled to exemplary damages for conduct that the defendants engaged in before 1984 or after 1996.~~[13]

[Under Louisiana the πs may be entitled to ~~punitive~~ exemplary damages only for conduct that the defendants engaged in between 1984 and 1996.]

[4474]

EXXONMOBIL'S PROPOSED INSTRUCTION 18

EXEMPLARY DAMAGES – DISCRETIONARY

Exemplary damages are within your discretion. This means that even if you find that the defendants' conduct was wanton or reckless, you are not required to award exemplary damages to the plaintiffs.[14]

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[13] Johnson, *Louisiana Civil Law Treatise, Civil Jury Instructions*, § 18.02; *Oubre v. Union Carbide Corp.*, 747 So.2d 22, 227 (La. App. 5th Cir. 1999); *Adams v. Marathon Oil Co.*, 688 So.2d 75, 76 n.2 (La. App. 5th Cir. 1997); *Haydel v. Herclules Transport, Inc.*, 654 So.2d 418, 438-39 (La. App. 1st Cir. 1995); *Landry v. Uniroyal Chemical Co., Inc.*, 653 So.2d 1199, 1205 (La. App. 1st Cir. 1995); *Lasha v. Olin Corp.*, 634 So.2d 1354, 1361 (La. App. 3d Cir. 1994); *Fuselier v. Amoco Production Co.*, 607 So.2d 1044, 1050 (La. App. 3d Cir. 1992); *Griffin v. Tenneco Oil Co.*, 531 So.2d 498 (La. App. 4th Cir. 1988).

[14] Johnson, *Louisiana Civil Law Treatise, Civil Jury Instructions*, § 13.02.

[4475]

APPENDIX B

Supreme Court
[SEAL] STATE OF LOUISIANA
New Orleans

PASCAL F. GALOGERO, JR. 400 Royal Street
CHIEF JUSTICE New Orleans, LA 70130

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CLERK OF COURT HOME PAGE
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April 24, 2006

Hon. Dale N. Atkins, Clerk
Orleans Parish – Civil District Court
421 Loyola Ave.
Suite 402
New Orleans, LA 70112

In Re: Grefer, Joseph etal
vs. Alpha Technical eta
No: 2005-C-1590

Dear Ms. Atkins:

This is to advise that the Court took the following acti on the Motion to Stay Execution of Judgment filed in t above entitled matter:

"Motion for Stay is Denied."

Victory & Weimer, JJ. would grant.

With kindest regards, I remain,

Very truly yours,

John Tarlton Olivier
Clerk of Court

/s/ Katherine A. Fontana
By: Katherine A. Fontana
Deputy Clerk of Court

KAF:rtd

ccs: All Counsel

Court of Appeal, Fourth Circuit, Number 2002-1237
Civil District Court Div. "A" Number 97-15004

APPENDIX C

La. C.C. art. 2315.3

Art. 2315.3. Additional damages, storage, handling, a transportation of hazardous substances

In addition to general and special damages, exemplı damages may be awarded, if it is proved that plaintif injuries were caused by the defendant's wanton or reckl disregard for public safety in the storage, handling, transportation of hazardous or toxic substances. As us in this Article, the term hazardous or toxic substan shall not include electricity.

(Repealed by Acts 1996, 1st Ex. Sess., No. 2, § 1, April 1996.)

REPLY BRIEF

FILED
AUG 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1670

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,
Petitioner,

v.

JOSEPH GREFER ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Plaintiffs do not – and cannot – deny that there is substantial disagreement in the lower courts regarding whether due process permits a jury to punish a defendant for its conduct toward non-parties. Plaintiffs likewise do not deny that there are conflicts in the lower courts regarding the appropriate remedy for improper consideration of third-party conduct and regarding the due process limits when compensatory damages are substantial. The *only* grounds for plaintiffs' opposition are their arguments that the conceded conflicts are not implicated by this case. But they are. Indeed, this case is an *ideal* vehicle to address those conflicts: plaintiffs received a $1 billion punitive damages award by scaring the jury with outlandish tales of unadjudicated potential harms to non-parties, and the Court of Appeal upheld the award, after reducing it to $112 million, based only on risks to non-parties. Plaintiffs' new attempts to manufacture support for the enormous award cannot obscure the significant issues here that warrant this Court's attention.

ARGUMENT

I. THE CONCEDED CONFLICT REGARDING HARM TO NON-PARTIES IS SQUARELY IMPLICATED IN THIS CASE

There is a clear conflict in the lower courts over whether due process allows punitive damages to be based on risks to non-parties, and it will be addressed in *Philip Morris USA v. Williams*. The decision below exacerbates that conflict because it upholds punitive damages based entirely on risks posed to ITCO employees, and it exposes ExxonMobil to a concrete risk of multiple punishment. This Court should grant review and hold that ExxonMobil cannot be punished for risks to non-parties. Alternatively, it should hold the petition pending *Williams*.

1. Plaintiffs concede the conflict in the lower courts over the circumstances under which a jury may consider harm to non-parties in adjudicating punitive damages, but they assert that the conflict is not implicated here because questions of harm to non-parties "simply are not issues in this case." Opp. Br. 9. Nothing could be further from the truth. At trial, plaintiffs "argue[d] and present[ed] substantial evidence . . . of the potential and/or alleged actual harm to other persons who were not parties to this suit." App. 53a. The jury instructions focused on risks to non-parties and made harms to the plaintiffs a secondary factor at best. *Id.* at 75a. The Court of Appeal upheld the award based *entirely* on ExxonMobil's nine-month delay in notifying ITCO of the risks posed by NORM, even though the delay had no effect on plaintiffs' "strictly economic harm." *Id.* at 50a-52a, 68a. And in their opposition to certiorari, plaintiffs *continue* to utilize risks to non-parties to justify punitive damages.[1]

2. Plaintiffs alternatively suggest (at 12) that the court below properly relied on potential harm to non-parties because that evidence "was related to the reprehensibility of Exxon's conduct." Plaintiffs are incorrect. Although effects of a defendant's conduct on non-parties may be considered in assessing reprehensibility when the defendant's conduct has similarly affected the plaintiffs, recklessness toward non-parties cannot supply the predicate for punitive damages when there is no similar recklessness toward the plaintiffs. Pet. 12. That necessary predicate is completely lacking here.

Plaintiffs argue (at 15-16) that evidence of ExxonMobil's recklessness toward ITCO was relevant to the reprehensibility of ExxonMobil's conduct toward plaintiffs because it showed ExxonMobil's general disregard for public safety.

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[1] *See* Opp. Br. 1 (property "is adjacent to a residential community"); *id.* at 13 (ExxonMobil "did nothing to warn ITCO for almost a year" and "failed to fully inform ITCO about the problem"); *id.* at 16 (ExxonMobil "put ITCO's workers and the surrounding neighbors at risk").

That argument proves too much. If recklessness toward third parties suffices to establish reprehensibility as to the plaintiff, then risks to non-parties would always suffice to justify punitive damages. This Court has squarely rejected that contention: "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

Further, plaintiffs suggest that punitive damages were properly based on plaintiffs' "potential[] liab[ility] to third parties under Louisiana law." Opp. Br. 17. First, plaintiffs' "potential liability" was not the reason that the appellate court upheld the award; the appellate court focused solely on risks to ITCO employees. Second, there is no record evidence establishing the nature and extent of those potential harms. Punitive damages must be based on "harm suffered by the plaintiff." *State Farm*, 538 U.S. at 418. Upholding punitive damages based on plaintiffs' belated, wholly unsupported, and purely speculative assertion of potential harms would open a tremendous loophole in *State Farm*, effectively eviscerating this Court's limits on punitive damages.

Plaintiffs also argue (at 12) that the punitive damages award was permissible under Louisiana Civil Code Article 2315.3 and thus constitutional. But it is far from clear that Article 2315.3, which has since been repealed, would allow use of harms to non-parties completely unmoored from harms to the plaintiffs. More fundamentally, the fact that state law may have required the jury instructions given only raises the constitutional question; it does not answer it.

3. Plaintiffs half-heartedly suggest (at 11) that even if the jury improperly considered risks to non-parties, the Court of Appeal "ensured that non-party harm was not the basis of the punitive award." That is incorrect. The Court of Appeal did not justify plaintiffs' punitive damages based on their harm, which everyone agreed was "strictly economic." App.

50a. Rather, it based them on ExxonMobil's "nine-month delay in notifying ITCO . . . of the dangers posed from handling NORM contaminated equipment" which "put [ITCO] employees at risk." *Id.* The appellate court's entire reprehensibility discussion focused on *ITCO*.[2] On petition for rehearing, the Court of Appeal identified the basis for punitive damages as "put[ting] ITCO's employees at risk," and it explicitly rejected ExxonMobil's argument that "harm to third parties cannot be punished." *Id.* at 68a.

4. Next, plaintiffs argue (at 17-19) that certiorari review is not appropriate because the second question presented in *Williams* is necessarily limited by the first question presented, and this Court's resolution of *Williams* will only affect cases in which the court below has used "the reprehensibility guidepost [to] override an otherwise unconstitutional ratio." In plaintiffs' view, so long as the ratio of punitive damages to actual harm is within permissible bounds, the punitive damages award *must* have been based on harms to the plaintiffs, and it does not matter what evidence the jury *actually* considered in assessing reprehensibility.

Plaintiffs cannot possibly be correct, because even they admit that *State Farm* places limits on the jury's consideration of the effects of the defendant's conduct on non-parties. Opp. Br. 18. As this Court said in *State Farm*: "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." 538 U.S. at 423. Plaintiffs' argument simply begs the question raised here and in *Williams*: After *State Farm*, when, if ever, may a factfinder consider

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[2] *See, e.g., id.* at 50a-51a (NORM "posed a health hazard" to ITCO); *id.* at 51a (delay "le[ft] ITCO with the mess"); *id.* ("ITCO's business steadily declined"); *id.* at 52a (delay "posed a direct danger to the physical health and safety of those workers").

harms to non-parties in awarding punitive damages?[3] That question has generated substantial disagreement; it is ripe for review; and it is critical to the outcome in this case.

5. Finally, plaintiffs suggest (at 11-12) that the issue of risks to non-parties is not properly before this Court. ExxonMobil pressed that argument before the Court of Appeal, and the argument was passed on by the Court of Appeal. *See* Brief of Appellant ExxonMobil Corp. at 29-34, *Grefer v. Alpha Technical*, No. 2002-CA-1237 (La. Ct. App. Dec. 30, 2002) ("ExxonMobil Br.") ("[T]he trial court impermissibly allowed Plaintiffs to present evidence of potential and/or alleged actual harm to other persons who were not parties to this lawsuit and whose claims were not before this jury."); App. 14a (Assignment of Error No. 6); *id.* at 50a-52a, 68a (rejecting argument that "harm to third parties cannot be punished" under *State Farm*). The issue is thus within this Court's certiorari jurisdiction. *See Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *see also* Robert L. Stern et al., *Supreme Court Practice* 175-76 (8th ed. 2002).

II. THERE IS AN UNRESOLVED CONFLICT REGARDING HOW TO REMEDY IMPROPER CONSIDERATION OF HARMS TO NON-PARTIES

The jury's award in this case was tainted by the consideration of improper evidence, and that taint was not remedied by the appellate court's reduction of the punitive damages award. As explained in the petition (at 22-25), due process limits on punitive damages include both a substantive and a procedural component. *See State Farm*, 538 U.S. at 416. Those different limitations require different reme-

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[3] Plaintiffs' attempt to distinguish this case from *Williams* suffers from a second flaw: it confuses the substantive limits on the amount of punitive damages with the procedural limits on consideration of certain evidence. A failure of procedural due process cannot be cured by reducing the resulting punitive damages award. *See infra* pp. 5-6.

dies. When a punitive damages award exceeds the constitutional maximum for the conduct at issue, that defect may be cured by reducing the award. But when a punitive damages award is constitutionally infirm due to improper evidence or instructional error, reduction of the jury's tainted award is insufficient because there is no way for the reviewing court to know how the improper evidence or instructions affected the jury's award. Plaintiffs do not address this important distinction at all. Nor do they take issue with the cases that demonstrate the substantial and mature conflict in the lower courts on this issue. Instead, they suggest that review by this Court is unnecessary for other reasons.

1. Plaintiffs first contend that this Court squarely reached the remedy issue in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and adopted a "rule of law" that "the choice between reducing an award to constitutional limits and ordering a new trial" in all cases is left "to the states." Opp. Br. 21. Plaintiffs completely misunderstand this Court's statement in *BMW*. The Court had already determined that the punitive damages award was "grossly excessive" and that the case should be remanded to the Alabama Supreme Court for further proceedings. 517 U.S. at 585-86. Rather than be the first court to address whether the appropriate remedy was a new trial or remittitur, the Court asked the state court to consider that question "in the first instance." *Id.* The Court did not hold that state courts always may decide the proper remedy for themselves; it simply asked *one* court in *one* particular case to answer a constitutional question before this Court would address it.

2. Plaintiffs also claim (at 23) that the resolution of the remedy question is dictated by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). Plaintiffs contend that because *Cooper* mandates *de novo* review of the constitutionality of punitive damages awards in all cases, there cannot be different remedies for different types

of constitutional violations. But *Cooper*'s *de novo* review requirement merely answers the question of what deference an appellate court should give to a trial court on the constitutional issues; it does not answer the substantive question of what the Constitution requires. When a reviewing court determines that a punitive damages award is tainted because of improper evidence or instructions, it has performed the appellate function contemplated by *Cooper*. The next question – the proper remedy – is a substantive constitutional question not addressed in *Cooper*. But this Court's other teachings, as well as the common-law limitations on remittitur, indicate that the proper remedy is a new trial.

Plaintiffs' related suggestion (at 23 n.20) that Louisiana law provides an adequate remedy for improper consideration of risks to non-parties is likewise misguided. Even assuming that Louisiana appellate courts may review the facts in a case *de novo* and render a judgment, that is not what the Court of Appeal did here. The Court of Appeal *approved* the jury's use of risks to ITCO employees to award punitive damages and rejected ExxonMobil's argument as "an incorrect and exceedingly narrow reading of *Campbell*." App. 68a. It attempted to remedy the problem of excessiveness by reducing the award to what it believed to be the constitutional maximum, but it provided no cure for the jury's consideration of harms to non-parties.

3. Next, plaintiffs renew their argument that if the ratio of punitive damages to actual harm is a single digit, "then the court can rest assured that non-party harm is not at issue in the award" – "*even if* conduct directed toward non-parties was considered" by the jury. Opp. Br. 21-22 (emphasis added). First, plaintiffs' statement (at 20) that "the 2:1 ratio in this case was based solely on the actual harm to the *plaintiffs*" is incorrect as a factual matter. The Court of Appeal explicitly relied on risks to ITCO in upholding the punitive damages award. *See supra* pp. 3-4.

Second, when a jury considers risks to non-parties and then returns a punitive damages award of twice the compensatory damages, one simply cannot know the basis for the award in the absence of a special verdict. The jury could have awarded the entire amount based on harms to the plaintiffs; it could have awarded the entire amount for risks posed to non-parties; or it could have decided to punish the defendants once for risks to the plaintiffs and once for risks to others. Only the first outcome is constitutionally permissible, yet there is no way to ensure that it is what happened.

4. Finally, plaintiffs suggest that there is no error because "Exxon *specifically requested* that the Fourth Circuit reduce the punitive award in this case." Opp. Br. 20. ExxonMobil asked the Court of Appeal to "vacate[] or reduce[]" the award "to comport with due process," App. 14a, because it argued *both* that the $1 billion jury award was substantively excessive and that it was impermissibly premised on risks to non-parties. *See* ExxonMobil Br. 31-35. The Court of Appeal agreed that the award was substantively excessive and reduced it, but it disagreed about risks to non-parties. Had the Court of Appeal agreed with ExxonMobil, it should have vacated the award and ordered a new trial.

III. THERE IS SIGNIFICANT DISAGREEMENT ON THE CONSTITUTIONAL MAXIMUM IN CASES OF SUBSTANTIAL COMPENSATORY DAMAGES

Even if the punitive damages award had been based entirely on harms to the plaintiffs, it would be excessive. Plaintiffs received an undeniably "substantial" award of restoration costs – 37 times their economic loss. In such a case, punitive damages are only justified if there is a reason for additional punishment and deterrence, and the amount of punitive damages should not exceed the plaintiffs' actual harm.

1. Plaintiffs essentially admit (at 28-29) that there is significant disagreement in the lower courts on the maximum punitive damages allowed when compensatory damages are

substantial. They argue only that the disagreement does not warrant review because it is due to the fact that juries sometimes "'reach disparate outcomes based on the same instructions.'" Opp. Br. 29 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 41 (1991) (Kennedy, J., concurring in the judgment)). ExxonMobil does not contend that this Court should intervene any time different juries reviewing similar conduct award different amounts of punitive damages. The problem here is that the lower courts have adopted conflicting rules of law regarding the constitutional upper limit on punitive damages in cases of substantial compensatory damages. Plaintiffs make no attempt to harmonize those rules.

2. Plaintiffs also argue (at 24-25) that *State Farm* does not require a 1:1 ratio of punitive damages to actual harm in all cases of substantial compensatory damages. What *State Farm* does make clear is that punitive damages must further a "legitimate purpose," such as punishment or deterrence. 538 U.S. at 417. Large compensatory damages awards have a deterrent function in themselves, *id.* at 426, so punitive damages "should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence," *id.* at 419 (emphasis added). When there is a substantial compensatory damages award, it is unlikely that additional punishment and deterrence are required, and that is why this Court suggested that a 1:1 ratio of punitive damages to actual harm is the constitutional maximum. *Id.* at 425.

Applying *State Farm*'s teaching to this case, there is no reason why additional punishment is required on top of the enormous $56 million restoration costs award. Plaintiffs' economic injury was more than fully remedied by an award that allows them to restore their property to their own specifications. App. 50a. The only reason plaintiffs offer for further punishment and deterrence is the risk of harm to non-

parties, and that cannot constitutionally be the only basis for the award.

Plaintiffs focus on this Court's denial of certiorari in *Boeken v. Philip Morris*, stating that it "demonstrates that the 2:1 ratio in this case is not constitutionally excessive." Opp. Br. 25. But of course a denial of certiorari has no precedential value. Equally significant, *Boeken* was a *personal injury* suit. A key reason why 1:1 is the maximum permissible ratio here is that plaintiffs suffered "only property damage," App. 53a, and reprehensibility is lessened when the plaintiffs' harm is "economic" rather than "physical," *State Farm*, 538 U.S. at 419.

3. Finally, plaintiffs try to justify the punitive damages award by arguing that their actual harm was the $56 million restoration costs award, not the $1.5 million value of their property. Opp. Br. 26-27. It is the "harm suffered by the plaintiff" that must be proportional to the punitive damages award. *State Farm*, 538 U.S. at 418. In many cases, the compensatory damages approximate the plaintiff's harm. In this case, they do not, because the plaintiffs' only "loss" is the $1.5 million value of their property. They did not lose $56 million, nor have they incurred any obligation to pay $56 million. The $56 million results simply from a special feature of Louisiana law allowing plaintiffs to recover restoration costs, even though they do not in any legal or colloquial sense "compensate" plaintiffs for any loss in value of the property. Having been fully compensated for the loss in value of their property, any additional money plaintiffs receive to restore the property to its prior condition is actually a windfall. The restoration costs award thus does not reflect any harm to which the punitive damages award properly may be compared.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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